Petition

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

TONG WOOK MOON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NINTH DISTRICT COURT OF APPEALS FOR LORAIN COUNTY, OHIO

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STATEMENT OF THE QUESTIONS PRESENTED

I. Whether the admission of evidence resultant from the execution of a search warrant, based upon an affidavit which failed to establish probable cause for its issuance, violates due process?

II. Where (as here) a search warrant is based upon material misstatements of fact, without which it fails to establish probable cause, must the fruits of its execution be suppressed?

III. Whether due process is violated where the trial judge's instructions as to the essential elements of the crime for which the accused is ultimately convicted are not only defective but are otherwise so ambiguous that it is impossible to divine from the guilty verdict the basis for the conviction?

IV. Whether a reviewing court may properly review a criminal conviction only on the theories that were submitted to the jury, which tenet thus bars the court from considering theories upon which a conviction could possibly have been based that are inconsistent with those actually submitted?

V. Whether due process is satisfied when the evidence in the Record fails to reasonably support a finding of guilty beyond a reasonable doubt?

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Tong Wook Moon, prays that a writ of certiorari issue to review the judgment of the Ohio Court of Appeals, Ninth Judicial District, which judgment became final on the 6th day of May, 1981, when the Supreme Court of Ohio denied further appellate review.

OPINIONS OF THE COURTS BELOW

The judgment entries by the Supreme Court of Ohio denying further appellate review are set forth at Appendices "A" and "B", infra, pp. A1 and A2 in the Appendix to this Petition.

The journal entry and opinion of the Ohio Court of Appeals, the judgment to which this petition is directed, is designated Appendix "C", pp. A3, et. seq.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The judgment of the Supreme Court of Ohio was entered on May 6, 1981. The jurisdiction of this Court is invoked under Title 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions involved herein are set forth as Appendix "E", p. A29 .

STATEMENT OF THE CASE

Dr. Tong Wook Moon, the petitioner here, was convicted of single count of violating Revised Code of Ohio, §2925.13, "Permitting Drug Abuse," a first degree misdemeanor for which he was sentenced to three months in jail and a $1,000.00 fine.

On appeal on questions of law from the verdict, sentence, and final judgment of the trial court, the Court of Appeals affirmed.

The Supreme Court of Ohio denied further appellate review.

STATEMENT OF FACTS[1]

1. Pretrial Motion to Suppress[2]

Despite the fact that the Affidavit for the Search Warrant was sworn to and subscribed by both Detective McBennett and Detective Smith, the evidence adduced at the hearing revealed that there were many allegations which were attributable to each affiant for which they did not have personal knowledge and could not attest to the truth of other than relying on the word of someone else (T 23,76).

While the Search Warrant Affidavit states that "a second buy of marijuana was obtained from Paul Moon," McBennett's evidence exposes this statement to be, at least, recklessly untruthful as to him. For, he admitted to having no personal knowledge of any such event (T 29,30). In fact, he was on vacation when that "buy" was allegedly consummated.

This officer also testified that the assertion in the Affidavit that "the

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1/ References made to the Transcript of Trial Proceedings will be designated by the prefix "R", while reference to the testimony adduced during the Motion to Suppress hearing will be preceded by the prefix "T".

2/ This evidence was elicited in the companion case of State v. Paul Moon, and was made a part of this Record by stipulation of the parties and by the court.

affiants have identified the vehicle used" in the transportation of large amounts of marijuana "... is true because that is what he [the informant] told me" (T 67).

Additionally, the officer admits that the allegation in the Affidavit that Dr. Moon's son Paul Moon had been "under investigation since 1977" distills into his having been told by unnamed individuals that Paul Moon sold marijuana. And, contrary to the indication in the Affidavit, Smith did not personally identify any vehicle allegedly used in the transportation of marijuana from Florida to Lorain. Even more importantly, this witness admits that he did not participate in the "third buy" on October 23, 1978. This being so, the allegations in the affidavit concerning that "buy" are, as to him at least, recklessly untruthful. This fact takes on additional significance since the issuing magistrate was primarily interested in the information concerning these alleged buys (T 65).

2. The Trial

(A)

The search of the house resulted in the confiscation of numerous items secreted in Paul and Phillip Moon's bedrooms. In a third room belonging to Peter Moon was found a large marijuana plant (R 13). In the basement, set up as a recreation area for these sons, behind a broken television set was found three (3) small jars containing suspected hash oil (R 28-29). Also discovered in

a crawl space in the basement, concealed in a stereo component box, were several pounds of marijuana (R 18,30).

Next, Detective Jay Smith offered evidence. He discovered the jars of hash oil mentioned earlier in these facts upon moving the television set away from the wall (R 52). His evidence was that the only way anyone could have seen these jars without moving the television was "from the extreme opposite corner," by bending down and looking under the set (R 91) which only stood six inches above the floor.

Dr. Tong Wook Moon testified to being surprised at the items discovered in his home. He had no knowledge of their existence (with the exception of the single plant thought to be his son, Phillip's, school project [R 247, et. seq.]). He knew nothing of the hash found secreted in the basement behind the television set (ibid).

(B)

While the doctor was originally indicted on twelve (12) counts, along with his son Paul and his wife, the Record shows Counts 1, 9, 11, and 12 were dismissed before trial (R 181). At the close of the State's case, the court granted, under Rule 29, Ohio Rules of Criminal Procedure, acquittals as to Counts 5, 6, 7 and 8 (R 182-184). Included in the Counts for which petitioner was exonerated was the charge that he possessed the same hash oil his son was convicted of possessing, which Count was nolled even prior to trial.

On the three charges submitted to the jury, petitioner was acquitted by them of "Possession of Marijuana in an amount equal to or exceeding three times the bulk amount" (Count 2) and "Engaging in the cultivation of the marijuana plant" (Count 4). He was convicted of the single charge of "Permitting Drug Abuse" (Count 10).

ARGUMENTS RELIED ON FOR ALLOWANCE OF WRIT

The clear upshot of such cases as Speigner v. Jago, 603 F.2d 1208 (6th Cir. 1979) and Jackson v. Virginia, 443 U.S. 307 (1979), is that the question as to whether there is sufficient evidence to support a rational trier of guilt beyond a reasonable doubt is one of constitutional dimension. This idea was emphasized in Speigner where the Ohio appellate court was credited with having concluded that "the totality of evidence against Speigner was sufficient as a matter of law to support a finding of guilt beyond a reasonable doubt." Speigner, at 1209. The parallel here to the Speigner case is the rather conclusory assertion made by the court of appeals (despite the admittedly ambiguous charge and the erroneous inclusion of an impermissible alternative basis for their verdict) to the effect that they could devine a theory upon which the jury might have acted, which theory had sufficient support in the evidence.

Because this problem of overreaching has reached epidemic proportions in our courts, the need for a fresh look by this Court is emphasized. Also, in this case we have a court inserting issues

into this case and then deciding the case on the basis of their analysis of those issues. Here, we refer to the court's discussion of plain error.

ARGUMENT I

THE ADMISSION OF EVIDENCE RESULTANT FROM THE EXECUTION OF A SEARCH WARRANT, BASED UPON AN AFFIDAVIT WHICH FAILED TO ESTABLISH PROBABLE CAUSE FOR ITS ISSUANCE, VIOLATES DUE PROCESS.

The affidavit specifically states the petitioner's son had been the subject of investigation at various times since 1977. This assertion is, of course, untrue and misleading (the significance of which is set forth in Argument II of this petition). Indeed, even if accurate, it affords no information whatsoever upon which a magistrate could rely in issuing a warrant. The averment as to certain legal activities at a bank fall in the same category.

Next, the affiants state they "received information that Paul Moon ha[d] recently been involved in the transportation of five hundred pounds of marijuana...." Since this important allegation fails to relate the source of the information, the nature of the information obtained (i.e., personal knowledge or hearsay) and the reliability of the source, it fails to pass constitutional muster.

The next paragraph asserts that "information" had been obtained from a reliable source who has, on two occasions in the past, given accurate information. Assuming this allegation satisfies the

requirement that "the informant was credible or his information reliable," the Affidavit fails to provide any of the "underlying circumstances" to support the conclusion that controlled substances could be located on the described premises.

Of extreme importance is the next assertion. Here, it is stated that "[i]n late September 1978... large quantities of marijuana... had personally been observed by the Confidential Informant at the... residence... in the past" (emphasis added). At the hearing on the Motion to Suppress, both officers conceded that this allegation does not reveal how recently this information had been gained (T 114,185). And, the affiants admit that, for aught that appears in the affidavit, this information could be ten years old (T 185). This revelation certainly negates any allowable reliance on the assertions therein. See, Rosencranz v. United States, 356 F.2d 310 (1st Cir. 1966); Durham v. United States, 403 F.2d 190 (9th Cir. 1968); and United States v. Boyd, 422 F.2d 791 (6th Cir. 1970).

Still another critical paragraph reads "that the confidential informant... stated that Paul Moon keeps Marijuana at his residence... for the purpose of sale." Again, there is absolutely no indication what the underlying circumstances were upon which the informant based this conclusion.

The next three paragraphs allege that three "buys" were made by the informant from Paul Moon at the residence. Yet, nowhere during the recitation of

these allegations does the informant state that he saw any other marijuana at the residence. In addition, in two of the three "buys", contrary to the Affidavit, each affiant had absolutely no knowledge of the events set forth.

Obviously then, there are definitely no probative affirmative allegations within the Affidavit satisfying the requirements of Aguilar, supra, to the effect that some of the underlying circumstances upon which the informant concluded that the contraband was presently on the premises sought to be searched are totally baseless.

In State v. Paul Moon[3], C/A No. 2876, the appellate court agreed that certain critical averments in the Affidavit were, in fact, "unsupported" (Appendix "D", p.A20) but apparently could not bring itself to take the next step and declare the Affidavit insufficient. On the other hand, our view is that one reading the Affidavit without these averments cannot avoid the required conclusion. Yet, that is what the appeals court attempted to do in State v. Paul Moon by specifically articulating, as a basis for avoiding the inevitable, a thesis that cannot survive meaningful scrutiny.

In voicing this absolutely untenable position, we are told that "the arranged

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3/ The Opinion in State v. Moon, No. 2876, decided December 5, 1979, is attached hereto as Appendix "D", pp.A17 to A28. This Court denied the Petition for Writ of Certiorari submitted therein (No. 79-6839).

'buy' alone established probable cause" (Appendix "D", p.A20). As the court of appeals saw it, when it was revealed in an Affidavit that police officers and an informant arranged "three buys within the two weeks prior to the search for the purpose of establishing probable cause"; and, in at least one of these "buys" an officer actually sees their informant enter the premises (sought to be searched) later exiting with contraband claimed to have been purchased inside the home; probable cause exists to believe there will be an additional quantity of such contraband inside the premises along with a plethora of other contraband.

Our assailment of the above conclusion is almost total for, given even the fact of the asserted occurrences, the conclusion that contraband other than Marijuana could be found on the premises is absolutely unreasonable. The same is true even as to the idea that only Marijuana would be found. Yet, the warrant here proclaimed there was probable cause to search for a number of specific items.

ARGUMENT II

WHERE A SEARCH WARRANT IS BASED UPON MATERIAL MISSTATEMENTS OF FACT, WITHOUT WHICH IT FAILS TO ESTABLISH PROBABLE CAUSE, THE FRUITS OF ITS EXECUTION MUST BE SUPPRESSED.

Assuming, for purposes of this argument only, that the warrant is

facially sufficient under Aguilar and Spinelli, supra, and their progeny; the question then to be resolved is: what effect do material misrepresentations of fact play in evaluating the effect to be given a warrant?

At the outset of the evidentiary hearing on the Motion to Suppress, Detective McBennett (one of two affiants to a single affidavit--the other being Jay Smith) was asked the following:

> Q And where it [the affidavit] says, affiant or affiants, it can be assumed that they are referring to both you, Mr. McBennett, and Mr. Smith, as to each and every allegation that is made in that affidavit? Is that fair to say?
>
> A Yes, sir....
>
> Q All I am indicating at this point is any reference to affiant in this affidavit, in addition to whoever else it may refer to, at least refers to you and Jay Smith.
>
> A Oh, yes, sir.
>
> Q Okay. And the allegations, when it says affiant says, can be attributed to you and Jay Smith at least?
>
> A Yes.
>
> (T 19-20)

Upon continued questioning, however, the following was revealed:

Q Okay. Now, do you understand when a person takes an oath that he has personal knowledge of certain things being true, do you understand that is what an affiant says in a search warrant?

A Right.

Q Okay. Now, you are indicating that there are some things in here [the affidavit for the search warrant] which may be attributable to you which you did not have personal knowledge of but have gained from other members of the police force or other citizens?

A Yes, sir.

Q So then, officer, is it fair to say that there are references in here that affiants know certain things, that you actually don't know personally but have gained the information through others?

A Right.

Q So then the truth of it is, and we will go down through the allegations--there are certain allegations which you cannot attest to the truth of other than relying on the word of someone else?

A This is true.

(T 23 [emphasis added].)

Concerning one of the most crucial allegations within the Affidavit, that is that a confidential informant purchased drugs from petitioner's son, Paul Moon (on October 17, 1978), the officer's evidence was:

Q Okay. So actually the statement in the affidavit that says "confidential informant was provided with Lorain Police funds a second buy of marijuana was obtained from Paul Moon at the 4009 Canterbury Court residence," you have no knowledge of that information at all, isn't that true, other than what has been told to you by others?

A That is correct. (T 29 and 30)

* * *

There exists in the Affidavit the assertion that in late September, 1978, affiants had received information that Paul Moon had been involved in the transportation of 500 pounds of marijuana, that the affiants have identified the vehicle used and the owner was not directly involved. However, the officer admitted that he had no such personal knowledge (T 61) and that this allegation is a conclusion he reached from the undisclosed information he had obtained (T 62). He finally submits that "the reason that I say that it is true, because that is what he [the informant] told me" (T 67).

The affiants' statement that "Paul Moon has been under investigation at various times since 1977" distills down to having been told by unnamed persons in the past that Paul Moon sold marijuana. While this is itself misleading at best, affiant Smith did not even join the department until March, 1978 (T 74).

Finally, Officer McBennett acknowledged that they believed and sought to confiscate "instruments to package [marijuana] for distribution"; "records of said drug transactions"; "safes"; "vaults"; and "two vehicles which Paul Moon is known to operate" despite the fact that they had not been given any information whatsoever to believe any of those items existed, nor were they the subject of personal observation or information received (T 193,197,199).

As to affiant Jay Smith, he candidly concedes, "I don't have personal knowledge of all the information that is in this search warrant in its entirety" (T 76). After much wrangling with the witness, he finally admitted that he did not have personal knowledge that "affiants have identified the vehicle used. Owner of said vehicle was not directly involved in the transportation of the drugs from Florida to Lorain" as the affidavit implies (T 91,94).

In fact, he finally reveals that "I am not sure if he [the informant] seen the marijuana in the vehicle when it was in bulk, but he did see after he had heard that that vehicle was used, I know he said he seen marijuana in the trunk, lying loose. And we are talking

about spillage." (T 119 [emphasis added].) Clearly then, the information in the Affidavit relating to this alleged transportation of drugs from Florida was not only not based on personal knowledge as the Affidavit implies, but also was not even based on direct knowledge of the informant.

As to the assertions made concerning an alleged controlled "buy" on October 23, 1978, this officer was not even present and had no personal knowledge of those alleged events (T 98,99 and 150).

The allegations in the Affidavit that "the deal was made with Paul Moon at the residence and marijuana was obtained from Paul Moon in exchange for money" was also not within this affiant's personal knowledge as the language suggests (T 151).

Nowhere in the Affidavit is it shown that any vehicles were ever used to transport marijuana or possessed marijuana. Nor does the Affidavit contain any affirmations that contraband instruments or that records of marijuana deals were kept at the residence (T 153 and 154).

While all the misrepresentations set forth within are important, perhaps the information concerning the alleged buys (charges subsequently dropped by the State) were most critical. In fact, Detective McBennett indicated that the issuing magistrate was perhaps most concerned with the allegations concerning the buys (T 65).

As the Affidavit appears, great length was spent on the details of a "buy" (page 3 of Affidavit). Directly succeeding these details are the allegations concerning a second and third "buy". The testimony revealed that affiant McBennett knew nothing of the second alleged "buy" and affiant Smith knew nothing of the third alleged "buy". This coupled with the issuing magistrate's interest in these assertions demands the conclusion that these allegations were both immaterial and false. Their exclusion from this warrant would render insufficient probable cause to search the premises.

This is not all. The assertions that the vehicles contained controlled substances were also recklessly made and were without <u>any</u> factual basis as were the affirmations that drug records, drug instruments and drug packaging material would be uncovered.

Finally, and not insignificantly, the information concerning the alleged transportation of Five Hundred Pounds of marijuana in a certain vehicle, while apparently based on personal knowledge of an informant as well as their own personal knowledge, distilled down to a conclusion of the informant based on hearsay information <u>he</u> had allegedly obtained.

The Record reveals lesser assertions equally unsupported but suffice it to say that without the previously indicated information, the Affidavit failed to satisfy minimal constitutional requirements demanded for the issuance of a

search warrant. Consequently, setting these allegations aside as Franks, supra, demands; there is simply insufficient evidence upon which a search warrant could properly be issued.

One day a court in Ohio is going to reach the conclusion that even "false impressions from the face of... [an] affidavit" (State v. Moon, C/A No. 2876), if that is all we really have here, ought not, indeed cannot, be routinely excused with impunity. When this happens, rather than classify flagrant fault characteristics of this ilk as being merely "the product of either negligence or mistake" (ibid), courts will be required to recognize there is a point where they simply have to stop pampering police officers, and exempting those who prepare affidavits for them, from the consequences of gross deficiencies in their ability to draft legally sufficient averments -- a circumstance that would make it unnecessary for courts reviewing their defective products to constantly defy logic and sometimes common sense.

Be all that as it may, the conclusion that these rather fundamental defects (which the court of appeals previously admitted were present in this Affidavit) were "the product of either negligence or mistake" (ibid) is, at best, a naked assertion that ought not have been determinative of the issues as framed in this case. This is particularly so since the critical question must surely be: would the warrant have been issued had the court been aware of the fact that these flaws were present

because the officers sought to deceive him, or because their negligence is really patented?

Even this is not all. So that this Court understands that our disagreement with the lower court's Opinion is total, we contend the statement therein that "even if the affidavit did imply that both affiants had personal knowledge of all the arranged 'buys,' the undisputed truth is that at least one or the other actually did have such knowledge" (ibid [emphasis added]) is a statement that begs the question.

Since no meaningful distinction can be drawn between "negligence or mistake" (ibid) and "deliberate or reckless falsehood" (id., at A21) in the context of this case, the court's conclusion that "even if the affidavit were defective under Franks v. Delaware", the search here was nonetheless valid and passed muster, cannot survive meaningful scrutiny.

To begin with, the appellate court's reference to Franks v. Delaware is appropriate. Yet, while it is true, as the court of appeals noted, "negligence or mistake" are insufficient (State v. Moon), that court was apparently oblivious to the fact that what is present here is not mere negligence or an innocent mistake. What we do have are facts showing significant statements made by the affiants in their Affidavit were calculated distortions that amount to a reckless disregard for the truth.

In our view, these misstatements

were not inadvertantly made, but rather, were made in bad faith. Add to this the further conclusion that, apart from these false statements, the Affidavit was insufficient; consequently our point must be accredited as valid. For once we eliminate the distortions and misstatements, what is left is the allegation that two weeks before the search warrant was issued, Paul Moon was seen at his parents' home and the "reliable informant" who was seen entering this home on three (3) occasions told either one or the other of the affiants he purchased small quantities of marijuana from Paul Moon that were turned over to the officers.

While probable cause is certainly not determined by the number of days between the last of the alleged "buys" and the date of the search, any probable cause that may have existed in the past continues to exist only to the extent that its underpinning probablities endure. Thus, it ceases to exist, if it ever did, once it becomes unreasonable to presume property once "known" to have been on the premises is still there.

Since marijuana is a product in great demand and lends itself to rapid disposition and consumption, absent the allegation about 500 pounds, and absent any allegation showing that Paul Moon's alleged conduct was anything other than the isolated transactions attributed to him by the informant, it follows that when so read, the Affidavit fails to support any determination that probable cause existed to believe the property sought by the warrant in this case was

on the premises that were to be searched.

Since the informant is not credited with having reported the presence of a large quantity of marijuana or the other property sought by the warrant, the conclusion that such property would be on the premises is not even the informant's assertion, but rather, the unfounded suspicions of over-zealous police officers.

So postured, the inference as drawn by the issuing judge that the various items particularized in the Affidavit could be located in the home of Paul Moon's parents or in the indicated car was patently unreasonable. Sgro v. United States, 287 U.S. 206 (1927), Conti v. Morgenthau, 232 F. Supp. 1004 (S.D.N.Y. 1964). Most relevant to this argument are the cases of United States v. Flanagan, 423 F.2d 745 (5th Cir. 1970), and United States v. Whitlow, 339 F.2d 975 (7th Cir. 1964). In any event, the point being urged is that the assertions in the Affidavit simply do not support the conclusion that probable cause existed to search Moon's residence or the car for anything. Also see United States v. DiNovo, 523 F.2d 197 (7th Cir. 1975), and United States v. Guinn, 454 F.2d 29 (5th Cir. 1972).

ARGUMENT NO. III

DUE PROCESS IS VIOLATED WHERE THE TRIAL JUDGE'S INSTRUCTIONS, AS TO THE ESSENTIAL ELEMENTS OF THE CRIME FOR WHICH THE ACCUSED IS ULTIMATELY CONVICTED, ARE NOT ONLY DEFECTIVE BUT ARE OTHERWISE

SO AMBIGUOUS THAT IT IS IMPOSSIBLE TO DIVINE FROM THE GUILTY VERDICT THE BASIS FOR THE CONVICTION.

In this case the court, in charging the jury as to the offense for which petitioner stands convicted (i.e., permitting the premises here involved to "be used to commit a felony drug abuse offense" [R 336]), defined "a felony drug abuse offense" as including "a conviction for the possession of hash oil or for possession of marijuana in the quantity alleged" (R 337).

Counsel, in the wake of this charge, complained to the court that the mere conviction of petitioner's son, Paul Moon, for the possession of hash oil could not supply a sufficient basis for a conviction of the petitioner on this count (R 342). The court nonetheless repeated the charge that the phrase "felony drug abuse offense" included (1) a conviction for possessing hash oil, or (2) a conviction for possessing marijuana (R 344-345).

Simply put, the court (based on the mere reference in the testimony that Paul Moon, the petitioner's son, had been convicted for possessing the hash oil found by the police concealed in the home [R 69]), then told the jury this petitioner could be found guilty if, in fact, there had ever been a conviction of anyone (we suppose) of possessing hash oil in that home.

Surely, it offends due process particularly the concept that guilt

remains personal and individual, to direct a jury to find the accused guilty of a specific crime on the basis of proof that another was guilty of a different crime. While it is a fact that petitioner's son had been convicted of possessing hash oil in this home, the jury could not properly jump from this fact to the conclusion that this petitioner perforce permitted him to violate the law by possessing this contraband in the family home.

Since it is clear that under the given instructions the jury was permitted to make this impermissible and unfounded construction, the given instruction must be viewed both as a due process violation and a prejudicial misdirection under R.C. of Ohio, §2945.83(D) and an affirmative indication under §2945.83(E) that this petitioner was indeed prejudiced thereby and prevented from having a fair trial.

Providing even further emphasis, the complaint made to the trial court was that its definition of a felony drug offense as including a conviction for (1) possessing hash oil, or (2) possession of marijuana in the quantities alleged was defective.

The court of appeals, in dealing with this very precise complaint, actually tortures the language "for possessing marijuana in the quantities alleged" so as to relate it to either the word offense or the word conviction (Appendix "C", p. A8). The fact that the court conceded the "gramatically proper construction would be for the phrase 'for

possessing marijuana'..." to modify the preceding noun "conviction" is significant. Yet, the court would read the phrase as relating back to the word offense.

Obviously then, the court must be telling us that since the jury could have read the court's charge as stating that "a felony drug offense" included possessing marijuana in the quantities alleged, the fact that the jury was not so instructed was irrelevant. Aside from the idea that any such construction of the language along the lines suggested by the court would violate basic rules of grammar,[4/] to the extent the jurors may have been confused, or simply may have misinterpreted the exact charge given them (to conform to that suggested by the court of appeals as a possibility), this petitioner was denied due process.

Also, the appeals court tells us that, in any event, the ambiguity in the court's language, insofar as the inclusion of the phrase "conviction of hash oil" was concerned, actually benefited the defendant since "a felony drug abuse offense requires a different element of proof on the prosecution's part" (ibid). Even this is not all, the court's further rationale that no objection was made to the charge itself is totally inconsistent with the facts.

4/ Even the court concedes that the "English habit of placing modifiers close to the words they modify is... [an] important part of grammatical word order." Perrin, Writer's Guide and Index to English, (3d Ed., Scott, Foresman & Co.).

Here, the Record shows the court was told that, in any event, we objected to the inclusion in the definition of a drug abuse offense a conviction of somebody else. The precise language used by counsel was that "we object to that instruction in any event" (R 342). This objection was emphasized when, after changing the word "hashish" to "hash oil", the defense again reaffirmed its original objection by stating it had no other objection "that we haven't already covered" (R 345).

Obviously this language reached the court's expressed unwillingness to correct the other aspects of the charge about which we had complained (R 342). What, of course, amplifies the wrong done petitioner by the given charge is mirrored bu the following segment of the Record, which resulted from comments made by the prosecutor. Here, the Record shows:

> MR. PINCURA: May we approach the bench?
>
> I note your correction on page 5 relating to hashish to hash oil. But by not saying cultivating as we have it in Count 4 would be part of a felony drug abuse offense.
>
> Are we excluding that from the jury's consideration?
>
> THE COURT: No. I don't think so. It is excluded from their consideration for permitting a drug abuse offense.

MR. PINCURA: Is it then the ruling of the Court that the Court doesn't feel that that is a felony drug abuse?

THE COURT: It is the opinion of the Court that it isn't to be added into that section because if he is convicted of cultivating it that is the offense. And he did it himself. He can't be convicted of two crimes for the same offense. (R 345-346 [emphasis supplied].)

This segment shows the utter depth of the trial court's confusion. And, it shows the artificiality of the appellate court's rationale about the asserted harmlessness of the obvious confusion that reigned here. Further, it shows gross defects in the court's reasoning that "a plethora of circumstantial evidence presented a source to spawn the jury's consideration of possession of marijuana as a felony drug abuse regardless of the presence of a conviction for such an offense" (Appendix "C", p. A8). What is most obvious is that the trial court sought to exclude from its definition of "drug abuse offenses" those offenses for which there had not been any conviction.

ARGUMENT IV

A REVIEWING COURT MAY PROPERLY REVIEW A CRIMINAL CONVICTION ONLY ON THE THEORIES THAT WERE SUBMITTED TO THE JURY, THIS TENET THUS BARS THE COURT FROM CONSIDERING THEORIES UPON WHICH A CONVICTION COULD POSSIBLY HAVE BEEN BASED THAT ARE

INCONSISTENT WITH THOSE ACTUALLY SUBMITTED.

Given the express and unequivocal indications in the court's charge as to the possible bases for a conviction of the petitioner for permitting the "premises to be used for the commission of a drug abuse offense" (R 336), it follows that our insufficiency arguments, made in this appeal, must be resolved exclusively on the basis of the evidence bearing on the charge actually given the jury. This is so because it would be most "unfair for a reviewing court to consider" theories upon which a conviction could possibly have been based that are inconsistent with those actually submitted to the jury. See Shepard v. United States, 290 U.S. 96, 102-103 (1933), and United States v. Check, 582 F.2d 668, at 683 (2d Cir. 1978). Also see United States v. Hannah, 584 F.2d 27 (3d Cir. 1978), where the court held that "an appellate court may properly review a criminal case... only on the theory submitted to the jury at trial by the prosecution" (id., at 32).

This then brings us to the ultimate point being made. Simply put, since petitioner was acquitted on the possession of marijuana charge in this indictment, the sole and only possible basis for his conviction under the given charge related to his son's conviction for possessing hash oil (R 69). This being so, the absence of any proof that the doctor was aware of the presence of

this hash oil[5/] in the home must be deemed determinative.

This being so, since there was a complete failure of proof here that petitioner in fact permitted the home to be so used by his son, who was convicted for the drug abuse offense of possession of hash oil, his conviction must be deemed invalid.

The cogency of the above argument is bolstered, first of all, by the acquittal for the possession of the marijuana charged in Count I of his indictment (R 335). And, it is bolstered by the absence of a conviction of anyone else in the household for possessing marijuana. Necessarily then, it can only follow that the conviction here was based wholly and solely on the naked fact of Paul Moon's conviction for possessing the hash oil found during the search.

Since the evidence here showed only Paul Moon's print on the hash oil jars that were secreted in the home, the total absence of any proof from which it

---

5/ Surely a "knowledge" requirement, likened to that articulated for "possession" cases (in State v. Haynes, 25 Ohio St. 2d 264 [1971]), in the context of this case required proof the petitioner was aware his son had secreted the hash oil on the premises. Absent such awareness, it is both illogical, unreasonable and unrealistic to conclude the petitioner permitted an act he was totally unaware was occurring.

could be inferred petitioner was aware his son had secreted the hash oil in the home makes his conviction here totally devoid of evidentiary support. Jackson v. Virginia, 443 U.S. 307 (1979).

ARGUMENT NO. V

DUE PROCESS IS ONLY SATISFIED WHEN THE EVIDENCE IN THE RECORD REASONABLY SUPPORTS A FINDING OF GUILT BEYOND A REASONABLE DOUBT.

In this case, both at the close of the State's case (R 163, et seq.) and again at the close of all the evidence (R 325), the defense moved the court for a judgment of acquittal. The central point made by the defense during the related arguments specifically emphasized that:

> ...While it is true that [Paul Moon] was convicted on the basis of the ...[hash oil] substance, that was found in the home. I don't think that that is the type of offense in the context that the Defendant is charged here.
>
> I fail to comprehend ...[that] simply because the son was convicted of having possessed something that was in the home, that we can reason from that that the Defendant, his wife and Paul Moon permitted these premises to be used for that purpose. There is no evidence that this Defendant knew that hash oil was in the house. It was secreted

behind the television on the floor. There is nothing to show that he had any knowledge of it. I think to say that he permitted something, he would have to know that it was going on. (R 191 [emphasis added].)

The above-indicated argument was as valid then as it is now. Since there is no evidence showing the requisite knowledge, the conviction here cannot survive constitutional scrutiny. Jackson v. Virginia, 433 U.S. 307 (1979).

Under Jackson, it is of course clear beyond dispute that a reviewing court must now go further than our courts were apparently prepared to go, Speigner v. Jago, 603 F.2d 1208 (6th Cir. 1979), and satisfy itself that the evidence in the Record could reasonably support a finding of guilt beyond a reasonble doubt.

On the basis of this standard, an analysis of the evidence here simply fails to support a finding that Dr. Moon was aware his son had secreted the hash oil in the home so as to make the doctor guilty of having permitted him to do so.

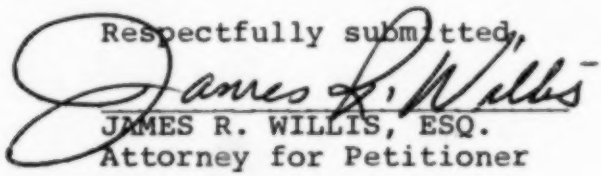
The fact that Dr. Moon was acquitted of the possession charge that was submitted to the jury could only have been based on the jury's conclusion that he lacked knowledge of its presence on the premises. Since the trial court expressly and intentionally excluded as a possible predicate for this conviction the charge that he was actually involved in the cultivation of the marijuana plant found on the premises (a charge for which he

was acquitted in any event), it becomes apparent this conviction simply cannot survive meaningful scrutiny.

CONCLUSION

For all of the foregoing reasons, the writ sought herein should be granted.

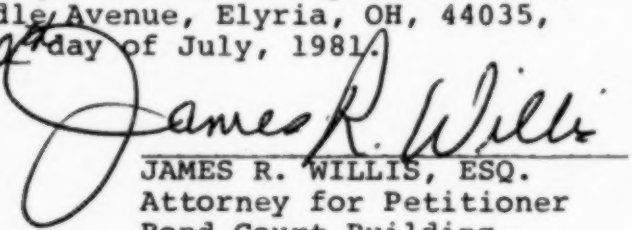
Respectfully submitted,



JAMES R. WILLIS, ESQ.
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was mailed to the offices of Gregory White, Esq., Lorain County Prosecutor, 226 Middle Avenue, Elyria, OH, 44035, this 30th day of July, 1981.



JAMES R. WILLIS, ESQ.
Attorney for Petitioner
Bond Court Building
Suite 1609
1300 East Ninth Street
Cleveland, OH 44114
216/523-1100

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

TONG WOOK MOON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITIONER'S APPENDIX

JAMES R. WILLIS, ESQ.
Bond Court Building, Suite 1609
1300 East Ninth Street
Cleveland, Ohio 44114
216/523-1100
ATTORNEY FOR PETITIONER

GREGORY WHITE, ESQ.
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226 Middle Avenue
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ATTORNEY FOR RESPONDENT

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THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO)
City of Columbus.)

1981 Term
To wit: May 6, 1981

State of Ohio,
Appellee,

vs.

TONG WOOK MOON,
Appellant.

)No. 81-223
)MOTION FOR LEAVE TO
)APPEAL FROM THE COURT
)OF APPEALS
)
)for Lorain County

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by James R. Willis.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of .....
19....

.....Clerk

.....Deputy

APPENDIX "A"

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO	)	1981 Term
City of Columbus.	)	To wit: May 6, 1981

State of Ohio,	)	No. 81-223
Appellee,	)	APPEAL FROM THE COURT
	)	OF APPEALS
vs.	)	
	)	
TONG WOOK MOON,	)	for Lorain County
	)	
Appellant.	)	

This cause, here on appeal as of right from the Court of Appeals for Lorain County, was head in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for Lorain County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19.....

.....Clerk

.....Deputy

APPENDIX "B"

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	
LORAIN COUNTY	)	NINTH JUDICIAL DISTRICT

STATE OF OHIO	)	C.A. NO. 3017
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE COMMON
TONG WOOK MOON	)	PLEAS COURT, LORAIN
	)	COUNTY, OHIO
Defendant-Appellant	)	CASE NO. 21645

Dated: December 24, 1980

DECISION AND JOURNAL ENTRY

This cause was heard September 17, 1980, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

BELL, P. J.

The factual background of the instant appeal is entwined with that of State v. Paul Moon, Lorain No. 2876 (9th Dist. Ct. App., December 5, 1979). For the purpose of clarity, we reiterate that history, in part, here.

Pursuant to a search warrant, Lorain Police seized, among other items, marijuana, cocaine, a marijuana plant, and hash oil at the Moon family home. Doctor and Mrs. Moon, their youngest son, and

APPENDIX "C"

another son, Paul, were all charged with possessing drugs.

This appeal arises from Dr. Moon's conviction for knowingly permitting the premises he owned, leased, or occupied at 4009 Canterbury Court, Lorain, Ohio, to be used for the commission of a felony drug abuse offense, on or about October 23, 1978, in violation of R.C. 2925.13.

Defendant raises in his appeal, the following claims of error:

"1. The trial court erred in denying appellant's motion to suppress.

"2. The admission of evidence resultant from the execution of a search warrant, based upon an affidavit which failed to establish probable cause for its issuance, violates due process.

"3. Where a search warrant is based upon material misstatements of fact, without which it fails to establish probable cause, the fruits of its execution must be suppressed.

"4. The court erred in instructing the jury, in the context of this case, that 'a felony drug abuse offense' included a conviction of possessing hash oil or marijuana of the quantity involved in this case.

"5. On the basis of the given instructions, bearing directly on the offense for which the appellant was convicted, there is insufficient evidence as a matter of law to sustain the appellant's conviction.

"6. The court erred in denying appellant's motion for judgment of acquittal since there is insufficient evidence to support the conviction."

Those issues contained in assignments of error one, two, and three were previously, and fully, considered in State v. Paul Moon, supra, where we determined that the affidavit herein established a substantial basis for belief per United States v. Harris, 403 U.S. 573, 581 (1971), and also met the two-pronged test of Aguilar v. Texas, 378 U.S. 108, 114 (1964).

We decided then, as we do now, that even if the affidavit herein was defective under Franks v. Delaware, 438 U.S. 154, 171 (1978), the undisputed fact still exists that at least one or the other of the police officers involved did have personal knowledge of the arranged "buys" and, hence, sufficient viable information remained to support probable cause. We reaffirm those determinations now and overrule said assignments of error one, two and three.

Defendant claims as his fourth assignment of error that the court erred in instructing the jury that a "'felony drug abuse offense' included a conviction of possessing hash oil or marijuana of the quantity involved in this case."

The court's instructions to the jury, which are in issue here, read, in pertinent part, as follows:

"***

"'A felony drug abuse offense' includes a conviction for possessing hash oil, a Schedule L (sic) Drug, or for possession marijuana in the quantities alleged." (Emphasis ours.) (T.O.P., pg., 337).

"***."

The court's discussion with counsel, was, in part, as follows:

"***.

"MR. WILLIS: One other thing, Your Honor, on page 5, (of the written charge) while a felony drug offense does include a conviction of possessing hashish, if the Court referred to the conviction of Paul Moon, that was for hash oil. If you want to make that change, I don't know. But we have no evidence concerning hashish in this case. There is no evidence relating to that. But we would object to that instruction in any event. Since we have the testimony of an officer that he believes Paul Moon was convicted of some offense, but we have the offense before the Court really.

"That is the extent of the objections that we raise at this time above and beyond renewing our objection that the included language within the proffered instructions was not included in the jury as we would like to have it be.

"THE COURT: I will correct the charge in relation to your first

objection. I will overrule your second objection. I will correct the charge with reference to your third objection and overrule the remainder of your objection to the third objection and overrule your third objection.

"***.

"MR. WALKER: On the instructions before the Court on page 5, you have included conviction of possession of hash oil. There is no conviction right now for any other offense.

"THE COURT: That is the question I am not sure about.

MR. WALKER: Because I know, Your Honor, reflecting upon the conviction of Paul Moon is the substance for that particular aspect of the charge. There is no other charge which he has been convicted."

"***." (Emphasis ours). (T.O.P., pgs. 341-343).

The court then read the following instruction to the jury:

"***.

"On the next page, which will be reflected in the charge as you have with you, a felony drug abuse offense includes a conviction for possessing hash oil instead of hashish, a Schedule I drug or for possessing marijuana in the quantities alleged.

"Is there anything further from

counsel?

"MR. WALKER: Not that we already haven't (sic) covered."

"***." (T.O.P., pg. 344-345).

In the foregoing amended jury instruction (T.O.P., pgs. 344-345) "for possessing marijuana in the quanties (sic) alleged" can be read to relate to either "offense" or "conviction." Though a strict, grammatically-proper construction would be for the phrase "for possessing marijuana***." to modify the closest preceding noun - "Conviction" - due to the presence of "or" said phrase could also be said to relate back to "offense."

Moreover, the effect, if any, upon the defendant's cause, of the ambiguity concerning the court's language with its inclusion of the phrase "***conviction for possessing hash oil***" would be to aid the defendant since a conviction for a felony drug abuse offense requires a different element of proof on the prosecution's part.

We read the instant instructions to set forth two examples of "felony drug abuse offenses" 1) the conviction for possessing hash oil, and 2) the offense for possessing marijuana in the quantities alleged.

If the court's inclusion in the jury instructions of the conviction for possession of hash oil was in error, it was harmless error since the plethora of circumstance evidence presented to the jury presented a source to spawn the jury's

consideration of possession of marijuana as a felony drug abuse offense, regardless of the presence of a conviction for such an offense. State v. Long, 53 Ohio St.2d 91 (1978).

Aside from the foregoing issues regarding the content of the court's instructions to the jury, Crim. R. 30 provides that a party may not assign as error the giving of or the failure to give instructions unless he objects thereto, stating specifically the matters to which he objects and the grounds thereof before the jury retires to consider its verdict. State v. Graven, 54 Ohio St.2d 114 (1978).

A perusal of the record reveals that defendant did not specifically object in the trial court regarding the errror he claims on appeal. Nor do we find that but for said alleged error, the outcome of the trial clearly would have been otherwise.

> "***Notice of plain error under Crim. R. 52(B) is to be taken with the utmost caution, under exceptional circumstances and only to prevent a manifest miscarriage of justice.***." State v. Long, 53 Ohio St.2d 91, 97 (1978).

The record of the instructions given in the instant cause does not meet the above criteria for plain error; we, therefore find assignment of error four to lack merit.

Defendant's remaining claims of error are bottomed upon his assertion that there was insufficient evidence as a matter of

law to sustain appellant's conviction and that the court erred in denying his motion for acquittal.

In considering a claim of error which attacks the sufficiency of evidence in a criminal case, this court's examination of the trial record is confined to a determination as to whether there was substantial evidence presented, evidence, "which if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." State v. Eley, 56 Ohio St.2d 169, 172 (1978); Atkins v. State, 115 Ohio St. 542, 546 (1927); State v. Sorgee, 54 Ohio St.2d 464, 465 (1978); State v. Sheppard, 165 Ohio St. 293 (1956).

The record reveals that the evidence presented to the jury in the instant case included the following:

"***.

"WITNESS: Jay Smith

"Q. Now, this ashtray was found in Paul Moon's bedroom, am I correct?

"A. That's correct.

"Q. And it had what you referred to as a roach?

"A. Yes, sir.

"Q. That is actually the butt of a marijuana cigarette?

"A. That's correct.

"A. That's correct.

"Q. So when you saw that that was apparent that someone had smoked a marijuana cigarette?

"A. Yes, sir."

"***." (T.O.P., Pg. 77).

"***.

"WITNESS: Gustalo Nunez

"A. The question came up as to the plant. Dr. Moon stated that he did have knowledge of the plant. That the plant was not his, it was his son's. The son was unnamed. I don't know what son owned the plant. He said that this plant was there because it was his son's school project and that he took care of it. He watered it and gave it plant food. But that it was not his."

"***." (T.O.P., Pg. 96).

"***.

"WITNESS: William B. Sutton

"A. Yes. I will go through each one individually. Item 9A, which was the plastic bag I showed you that one which contained green vegetable matter was analyzed both microscopically and cehmically and was positive for marijuana.

The weight was 69.2 grams.

"Item B was another plastic bag. The green vegetable matter was found to be marijuana also, which weighed 353.3 grams. Item 9C, which was the burlap bag, inside had a trace amount of marijuana which was .6 grams.

"Item 9D, the very large plastic bag was ana!yzed chemically and microscopically and was found to be marijuana. The total weight there is 3,854.7 grams.

"Item 9El, this was that paper sack that had the vegetable matter, both in the plastic bag and loose in the paper sack. Both of these items were found to be marijuana, both chemically and microscopically. The weights were 6.9 grams and 15.7 grams.

"Item 9F, which was the little amber plastic vial with compressed vegetable matter was analyzed both microscopically and chemically. This time it was found to be hashish, a different marijuana resin preparation, much more potent. The weight of that was 3.1 grams. Those were all the items that were in that box."

"***." (T.O.P., 139-140).

"***.

"WITNESS: Tong Wook Moon

"Q. Didn't they in fact take you to the room where the marijuana seeds were on the floor, the ones that you testified that you saw on the floor by the bed?

"A. Pardon me, sir?

"Q. Didn't the police take you to that room and show you those seeds on the floor?

"A. They didn't have to show me. They take a picture."

"***." (T.O.P., Pg. 264).

"***.

"Q. You saw that plant three or four days before the search warrant was executed. You knew what kind of a plant that was, didn't you?

"A. Yes."

"***." (T.O.P., Pg. 266).

"***.

"Q. But you had occasion to go to the basement from time to time?

A. From time to time."

"***." (T.O.P., Pg. 271).

"***.

"Q. You told them if you had to go to jail you would go to jail?

"A. Yes. At the beginning of the searching of your house I was pretty sure they could not find anything else in the house. So he asked me, this is your premises. Anything that happens I would be responsible."

"***." (T.O.P., Pgs. 283, 284).

"***.

"WITNESS: James McBennett

"Q. Did you have a conversation with him (Dr. Moon) at that time shortly after the signing of that?

"A. Yes, sir.

"Q. What was the conversation you had at that point?

"A. That is when Phillip Moon, who is a juvenile, was going to be charged with some of the items that were found in his room.

"Q. I see.

"A. And a juvenile is processed something different than an adult in a violation. We explained to Dr. Moon that Phillip was going to be cited to Juvenile Court. But that he wasn't going to be taken into

> custody. That the Juvenile Court sends a latter. We don't incarcerate them or anything because they are juveniles.
>
> At that time that is when the doctor said that it was his house, everything in it is his, and anybody else, and it was his responsibility."

"***." (T.O.P., Pg. 304).

In both circumstantial and testimonial evidence, a jury is asked to weigh the factors of guilt as against the possibility of inaccuracy or ambiguous inference. A jury utilizes experiences with people and events in weighing many probabilities. We will reverse only where the circumstantial evidence is insufficient as a matter of law to enable the jury to exclude a reasonable hypothesis of innocence. State v. Graven, 54 Ohio St.2d 114, 119 (1978), Jackson v. Virginia, 443 U.S., 307 (1979). Such criteria for reversal was not present here.

The record before us reveals circumstantial evidence sufficiently substantial so as to enable the jury to exclude a reasonable hypothesis of innocence.

Assignments of error five and six are also without merit.

We, therefore, affirm.

The court finds that there were reasonable grounds for this appeal.

We order that a special mandate, directing the Lorain County Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

Exceptions.

Presiding Judge
for the Court -

VICTOR, J.
HUNSICKER, J.
CONCUR

(Hunsicker, J., retired Judge of the Ninth District Court of Appeals, sitting by assignment pursuant to Article IV, §6(C), Constitution).

APPEARANCES:

JOSEPH R. GRUNDA, Prosecuting Attorney, 226 Middle Ave., Elyria, OH, 44035 for Plaintiff-Appellee.

STEPHEN WALKER, Attorney at Law, Bond Court Bldg., Suite 1609, 1300 E. Ninth St., Cleveland, OH, 44114 for Defendant-Appellant.

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	
LORAIN COUNTY	)	NINTH JUDICIAL DISTRICT

STATE OF OHIO	)	C.A. NO. 2876
	)	
Plaintiff-Appellee,	)	
	)	
v.	)	APPEAL FROM JUDGMENT
	)	ENTERED IN THE COMMON
PAUL MOON	)	PLEAS COURT, LORAIN
	)	COUNTY, OHIO
Defendant-Appellant.	)	CASE NO. 21649

Dated: December 5, 1979

DECISION AND JOURNAL ENTRY

This cause was heard August 15, 1979, upon the record in the trial court, including the transcript of proceedings, and the briefs. It was argued by counsel for the parties and submitted to the court. We have reviewed each assignment of error and make the following disposition:

MAHONEY, J.

Defendant Paul Moon was convicted of trafficking in drugs in violation of R.C. 2925.03(A)(6), by a jury which found him guilty of possessing hash oil. He appeals his conviction. We affirm.

FACTS

Pursuant to a search warrant, Lorain police seized marijuana, cocaine, a marijuana plant, hashish, hash oil, and pills

at the Moon family home. Dr. and Mrs. Moon, their 17 year old son Phillip, and their older son Paul were all charged with possessing drugs. This appeal arises from Paul's conviction. At the time of the search, Paul was maintaining his own apartment in Strongsville. However, he visited his family's home frequently.

During trial, all charges against Paul were dropped with the exception of possessing hash oil. Officers discovered the hash oil in three jars, hidden behind an inoperable television set in the basement. A fingerprint lifted from one of the jars corresponded with Paul's right ring finger.

ASSIGNMENT OF ERROR I

> "Where bail pending appeal is expressly authorized, a trial court, in denying bail in a particular case, must act reasonably and not arbitrarily or discriminatingly."

A defendant appealing his conviction is not entitled as a matter of right to bail pending appeal. See, Crim. R. 46(E). The decision to grant bail is within the discretion of the courts. Coleman v. McGettrick, 2 Ohio St.2d 177, 179 (1965) cert. denied, 382 U.S. 834 (1965). In exercising that discretion we believe the trial judge must operate within the framework of Crim. R. 46.

The trial court had ample opportunity to evaluate the proof against Moon and to observe his demeanor. The judge indicated he considered Moon a threat to the community and was anxious to confine him as

soon as possible. We cannot say that the judge abused his discretion or acted in an arbitrary and discriminating manner.

ASSIGNMENT OF ERROR II

> "The admission of evidence resultant from the execution of a search warrant, based upon an affidavit which failed to establish probable cause for its issuance, violated due process."

Probable cause justifying a search warrant in this case was established by means of an affidavit. In this affidavit, the affiants, two officers, derived some of their information from a confidential informant's hearsay reports.

An affidavit based on hearsay information is proper if it satisfied the requirements of Aguilar v. Texas, 378 U.S. 108, 114 (1964). First, the magistrate must be informed of some of the circumstances underlying the informant's conclusion. Second, the magistrate must be informed of some of the reasons why the the officer concluded that the informant's information was reliable. The latter requirement, regarding the informant's reliability, is not at issue here. The affidavit recited that the informant had supplied reliable information on two previous occasions. See, State v. Karr, 44 Ohio St.2d 163, 165 (1975) cert. denied 426 U.S. 936 (1976).

In this case, the affidavit reveals that the officers and the informant arranged three "buys" within the two weeks prior to the search, for the purpose of

establishing probable cause. In at least one of these buys, where an officer actually saw Paul Moon answer the informant's knock, the informant had been searched for drugs before he entered the Moon residence. The officers kept the informant in sight once he left the Moon home and confiscated the marijuana which the informant claimed he brought there.

As long as the affidavit establishes a "substantial basis" for belief that drugs were in the Moon household, the magistrate was justified in issuing the warrant. United States v. Harris, 403 U.S. 573, 581 (1971). The combination of the informant's personal knowledge and the police work which corroborates that information satisfies the first requirement of Aguilar v. Texas, supra, and establishes probable cause. State v. Graddy, 55 Ohio St.2d 132, 139 (1978); Stte v. Karr, supra at 165; State v. Trent, 74 Ohio Op.2d 275 (Ct. App. 1975).

The affidavit's averment that Paul Moon transported 500 pounds of marijuana from Florida to Lorain may lack sufficiency under the Aguilar test because the affiants did not reveal how the informant obtained his knowledge. The averment that the informant saw a large quantity of marijuana at the Moon home "in the past" may also be insufficient. Despite these unsupported averments, the arranged "buys" alone establish probable cause. Whenever possible, affidavits must be construed to establish probable cause. State v. Karr, supra, at 167. Therefore, we find that the affidavit establishes a substantial basis for belief per United States v. Harris, supra, and meets the

two-pronged test of Aguilar v. Texas, supra.

ASSIGNMENT OF ERROR III

> "Where a search warrant is based upon material misstatements of fact, without which it fails to establish probable cause, the fruits of its execution must be suppressed."

Under Franks v. Delaware, 438 U.S. 154, 171 (1978), a defendant can attack an affidavit underlying a search warrant if the affiant is deliberately or recklessly untruthful. The attack fails, however, if absent the tainted information probable cause still exists.

In this case, Moon claims that the affiant committed falsehoods. He alleged that language in the affidavit suggests both affiants had personal knowledge of subjects of which only one of them, or the informant, actually had first-hand knowledge.

Franks v. Delaware, supra at 171, distinguishes deliberate or reckless falsehood from negligence or mistake. Here, any false impression from the face of the affidavit is obviously the product of either negligence or mistake. Even if the affidavit did imply that both affiants had personal knowledge of all the arranged "buys," the undisputed truth is that at least one or the other actually did have such knowledge. The officer without personal knowledge was justified in relying on his fellow officer's word as evidenceupon which to

base a search warrant. United States v. Ventresca, 380 U.S. 102, 111 (1965). In other words, even if the affidavit were defective under Franks v. Delaware, supra, enough viable information remained in the affidavit to support probable cause.

ASSIGNMENT OF ERROR IV.

> "Evidence showing a single fingerprint of a defendant on one of three jars containing a contraband substance, found in a generally accessible area of a home occupied by the defendant's parents and brothers, is insufficient to support his conviction for the illegal possession thereof."

Recently, courts reviewing a criminal conviction have evolved from a policy of minimal scrutiny to a stricter standard. According to In re Winship, 397 U.S. 358 (1970), the Due Process Clause of the Fourteenth Amendment mandates that no person shall be convicted of a crime unless the trier of fact is convinced beyond a reasonable doubt of every element of the offense. Extrapolating from this rule, the Supreme Court constructed a new test for reviewing criminal convictions: a conviction may be sustained on review only if, after construing the evidence in the prosecution's favor, the reviewing body concludes that a rational trier of fact could have found the essential element of a crime existed beyond a reasonable doubt. Jackson v. Virginia, 99 S. Ct. 2781 (1979). Ohio echoes this standard. State v. Eley, 56 Ohio St. 169, 172 (1978); State v. Sorgee, 54 Ohio St.2d 464, 465 (1978).

To convict a defendant for possession of an illegal drug, the prosecution must prove that the accused (1) actually possessed or controlled the substance, (2) knew the substance was in his possession, and (3) knew what the substance was. See, State v. Haynes, 25 Ohio St.2d 264, 269-270 (1971).

The following evidence, construed in the light most favorable to the state, emerged at trial: (1) the hash oil, though found in an accessible area of the basement, was obviously hidden behind an inoperable television set; (2) Paul's ring fingerprint appeared on one of the jars; (3) his mother testified that he would visit the family home frequently and that he had access to his bedroom and the basement; (4) a police officer saw him in the doorway, wearing a bathrobe, two weeks before the drugs were seized. Also significant were the items found in Paul's bedroom: (a) a marijuana roach (cigarette butt); (b) a bag of cocaine; (c) an envelope filled with marijuana seeds; (d) a pocket calendar with Paul's name on it, and names and phone numbers inscribed inside, which lay next to (e) a Cultivator's Handbook of marijuana; (f) a bottle of "root stimulator."

After interpreting the evidence in the prosecution's favor, we conclude that a rational trier of fact could have found that the elements of the crime of possessing hash oil existed beyond a reasonable doubt. Paul had sufficient access and connection to the hash oil to sustain a finding of possession or control. A rational trier of fact could infer from the above evidence that Moon knew the

substance was in his possession and that he knew what the substance was. State v. Haynes, supra, at 269-70. Therefore, under Jackson v. Virginia, supra, State v. Eley, supra, and State v. Sorgee, supra, we find there was sufficient evidence to support his conviction, and we overrule the assignment of error.

ASSIGNMENT OF ERROR V

"In the context of this case, the court's intervention into the defense summation, during which he forcibly made certain remarks that unavoidably had the effect of buttressing the state's case and deflating a crucial aspect of the defense then being put forth, (A) violated due process; and (b) otherwise compromised the appellant's right to the effective assistance of counsel."

"A. The question came up as to the plant. Dr. Moon stated that he did have knowledge of the plant. That the plant was not his, it was his son's. The son was unnamed. I don't know what son owned the plant. He said that this plant was there because it was his son's school project and that he took care of it. He watered it and gave it plant food. But that it was not his."

"***." (T.O.P., Pg. 96).

"***.

"WITNESS: William B. Sutton

"A. Yes. I will go through each one individually. Item 9A, which was the plastic bag I showed you that one which contained green vegetable matter was analyzed both microscopically and chemically and was positive for marijuana. The weight was 69.2 grams.

"Item B was another plastic bag. The green vegetable matter was found to be marijuana also, which weighed 353.3 grams. Item 9C, which was the burlap bag, inside had a trace amount of marijuana which was .6 grams.

"Item 9D, the very large plastic bag was analyzed chemically and microscopically and was found to be marijuana. The total weight there is 3,854.7 grams.

"Item 9El, this was that paper sack that had the vegetable matter, both in the plastic bag and loose in the paper sack. Both of those items were found to be marijuana, both chemically and microscopically. The weights were 6.9 grams and 15.7 grams.

"Item 9F, which was the little amber plastic vial with compressed vegetable matter was analyzed both microscopically and chemically. This time it was found to be hashish, a different marijauan resin preparation, much more potent."

The judge simply objected to counsel's inuendo that our society is a police state. He did not in any way disparage counsel's legal argument or attack the integrity of the defendant's case. See, e.g., Quercia v. United States, 289 U.S. 466, 472 (1933); State v. Thomas, supra. Therefore, we find that a jury did not misunderstand the judge's remarks to Moon's prejudice. Neither his right to a fair trial nor his right to effective assistance of counsel was impaired. State v. Wade, 53 Ohio St.2d 182, 189 (1978) vacated on the grounds, 438 U.S. 911 (1978).

ASSIGNMENT OF ERROR VI

> "Due process is denied an accused when the trial court fails to incorporate in its charge to the jury instructions encompassing the present status of the law. Similarly, failure to include in its charge to the jury the accused's theory of defense, such instructions having been tendered in writing and correctly embodying the law, denied an accused that fundamental fairness to which he is entitled."

Special instructions, if they are pertinent, correct, timely, and reduced to writing, must be included, at least in substance, in the general charge to the jury. Cincinnati v. Epperson, 20 Ohio St.2d 59, 61 (1969). The corollary to this rule is the following: as long as the general charge covers the essentials of the requested instruction, refusing to give a special instruction

verbatim does not constitute error. State v. Henley, 15 Ohio St.2d 86, 90 (1968) cert. denied 393 U.S. 1006 (1968).

Here, Moon asked for an instruction which included the following:

> "***Before you can find the defendant guilty of this charge, you must find beyond a reasonable doubt that he had actual possession or control of the substance, that he knew what the substance was, and that he knew it was in his possession or control."

The judge did not issue this instuction verbatim. Instead, he informed the jury that aggravated trafficking in drugs required finding "knowing possession." He defined both terms, stressing that possession means control and may not be inferred from mere access to or occupation of the premises.

We feel that the instruction that was given was an accurate statement of the law and comprehended Moon's theory of defense. See, State v. Bednarik, 101 Ohio App. 339, 343 (1954). It covered the substance of the instruction that the defense offered. Therefore, we decline to find error in the charge.

SUMMARY

We overrule all six assignments and affirm the judgment of conviction.

The court finds there were reasonable grounds for this appeal.

We order that a special mandate, directing Lorain Common Pleas Court to carry this judgment into execution, shall issue out of this court. A certified copy of this journal entry shall constitute the mandate, pursuant to App. R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App. R. 22(E).

Costs taxed to appellant.

"Exceptions.

Presiding Judge
- for the Court -

VICTOR, P.J.
EWING, J.
CONCUR

(Ewing, J., retired Judge of the Probate Court of Elyria, Ohio, sitting by assignment pursuant to Article IV, §5(A)(3), Constitution).

APPEARANCES:

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CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

CONSTITUTIONAL AMENDMENTS:

IV: "The right of the people to be secure in their houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

XIV: "***[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

OHIO RULES OF CRIMINAL PROCEDURE:

RULE 29(A): Motion for Acquittal.

"The court on motion of a defendant or on its own motion, after the evidence on either side is closed, shall order the entry of a judgment of acquittal of one or more offenses charged in the indictment, information, or complaint, if the evidence is insufficient to sustain a conviction of such offense or offenses. The court may not reserve ruling on a motion for judgment of acquittal made at the close of the state's case."

RULE 41(C): SEARCH AND SEIZURE:
(B) Issuance and Contents.

APPENDIX "E"

"A warrant shall issue under this rule only on an affidavit of affidavits sworn to before a judge of a court of record and establishing the grounds for issuing the warrant. The affidavit shall name or describe the person to be searched or particularly describe the place to be searched, name or described the property to be searched for and seized, state substantially the offense in relation thereto, and state the factual basis for the affiant's belief that such property is there located. If the judge is satisfied that probable cause for the search exists, he shall issue a warrant identifying the property and naming or describing the person or placed to be searched. The finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay is to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the judge may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed and made part of the affidavit. The warrant shall be directed to a law enforcement officer. It shall command the officer to search, within three days, the person or placed named for the property specified. The warrant shall be served in the daytime, unless the issuing court, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime.

The warrant shall designate a judge to whom it shall be returned.

OHIO REVISED CODE:

§2925.13 Permitting Drug Abuse

***

(A) "No person, being the owner, lessee, or occupant, or having custody, control, or supervision of premises, or real estate, shall knowingly permit premises, including vacant land, to be used for commission of a felony drug abuse offense by another person."

§2945.83(D) and (E): When a new trial shall not be granted.

"No motion for a new trial shall be granted or verdict set aside, nor shall any judgment of onviction be reversed in any court because of:

***

(D) A misdirection of the jury unless the accused was or may have been prejudiced thereby;

(E) Any other cause unless it appears affirmatively from the record that the accused was prejudiced thereby or was prevented from having a fair trial."

Opposition

Office - Supreme Court, U.S.
FILED
OCT 10 1981
ALEXANDER L. STEVAS,
CLERK

NO. 81-238

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TONG WOOK MOON,

PETITIONER,

v.

STATE OF OHIO,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NINTH DISTRICT COURT OF APPEALS FOR
LORAIN COUNTY, OHIO

RESPONDENT'S BRIEF IN OPPOSITION

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NO. 81-238

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TONG WOOK MOON,

Petitioner,

v.

STATE OF OHIO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
NINTH DISTRICT COURT OF APPEALS
FOR LORAIN COUNTY, OHIO

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, State of Ohio, respectfully requests that this Honorable Court deny the petition for writ of certiorari seeking review of the Ninth District Court's opinion where the judgement become final on May 6, 1981 when, on that date, the Supreme Court of Ohio denied jurisdiction.

QUESTIONS PRESENTED FOR REVIEW

I. Whether a substantial federal question exists where the Ohio District Court of Appeals determined that evidence admitted at trial

resulting from the execution of a search warrant was properly admitted in that the misstatements in the warrant affidavit were only minor and did not affect the validity of the warrant affidavit which did establish probable cause when taken as a whole?

II. Whether a substantial federal question exists where the Ninth District Court of Appeals held that the minor misstatements of fact, when set aside, do not render the warrant affidavit invalid under Franks v. Delaware, 438 U.S. 154 (1978)?

III. (A) Whether a substantial federal question exists where the Ohio Court of Appeals concluded that every essential element of the crime was contained in the jury instruction and, when considered with the plethora of circumstantial evidence presented at trial, was more than enough to spawn the jury's consideration of possession of marihuana as a felony drug abuse offense, regardless of the presence of a conviction for such an offense?

(B) Whether a substantial federal question exists where in the absence of plain error and pursuant to Ohio Criminal Rule 30, the Petitioner at trial failed to specifically object to the contents of the court's jury charge and the Ohio appellate court thus determined that the Petitioner failed to preserve this issue as error.

IV. Whether a substantial federal question exists where the appellate court determined that the trial court's jury charge embraced, in the definition of the element of knowingly permitting the premises to be used for the commission of a felony drug abuse offense, both the possession of marihuana and a conviction for the possession of hash oil in that the Court of Appeals merely passed upon the propriety of the

charge and did not, as the Petitioner has alleged, consider theories other than those which were presented to the jury?

V. Whether a substantial federal question exists where the Court of Appeals held that the evidence was sufficiently substantial so as to enable the jury to exclude a reasonable hypothesis of innocence which therefore barred said court from reversing the conviction?

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OPINIONS AND JUDGEMENTS DELIVERED BY THE COURTS BELOW

The judgement entry and opinion of the Ninth District Court of Appeals for Lorain County, Ohio which prompted this appeal has already been fully set forth in Petitioner's Appendix "C" at page A-3 et seq.

The judgement entry and opinion of the Ninth District Court of Appeals in the closely related case of State of Ohio v. Paul Moon has already been fully set forth in Petitioner's Appendix "D" at page A-17 et seq.; however, on page A-20 therein, there exists a typographical error which appears at the top of said page. The second complete sentence appearing on that page should read: "The officers kept the informant in sight once he left the Moon home and confiscated the marijuana which the informant claimed he bought there. (emphasis supplied to denote the correction of this word which was erroneously spelled as "Brought".)

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THIS CASE INVOLVES

The relevant rules, constitutional, and statutory provisions involved in this case have already been fully set forth in Petitioner's Appendix "F", page A-29, et seq.; however, the Respondent has provided an additional provision, Ohio Criminal Rule 30, at page A-1 of Respondent's Appendix "A" in that Respondent believes said provision is applicable to question II(B) herein.

STATEMENT OF THE CASE

The conviction of Petitioner, Tong Wook Moon, for the violation of Ohio Revised Code Section 2925.13, Permitting Drug Abuse, a misdemeanor of the first degree, stemmed from the evidence seized pursuant to a search warrant executed at his home on October 24, 1978. (Transcript of Trial Proceedings, hereinafter cited as "R", at 167-168).

The Petitioner's son, Paul Moon, was convicted for Aggravated Trafficking in Drugs in connection with the seizure of hash oil found during the execution of the same warrant. (1)

Detectives McBennett and Smith of the Lorain City Police Department composed a warrant affidavit which formed the basis for the search of the Petitioner's residence. In the Affidavit, references to Detectives McBennett and Smith are made in the plural form through the use of the word "affiants". (See Respondent's Appendix "B" at A-2, et seq., wherein the entire text of the warrant affidavit is set forth). Of primary importance to the instant case is the warrant affidavit with respect to the three (3) controlled buys arranged by the Lorain City police to establish probable cause as a predicate to the issuance of the search warrant. Although the warrant affidavit used the word "affiants", only one detective was present at each "buy". (Transcript of Suppression hearing, hereinafter cited as "T", at 28, 29, 98). Detective McBennett personally witnessed the controlled buys which occurred on October 10 and October 23 of 1978. (T at 28, 98). Detective Smith actively participated in the controlled buy of October 17, 1978 (T at 29).

In addition and prior to the controlled buys, the affiants stated that they had been informed in September of 1978 by the confidential informant

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(1) This Court denied certiorari in the related case of Paul Moon v. State of Ohio (no. 79-6839) where Argument II and III therein are essentially verbatim to those propounded in the Petitioner's questions I and II herein and to the assignments of error in both Appellant's court cases. The Ohio Appellate Court has cited State of Ohio v. Paul Moon, C.A. No. 2876 in its decision in the instant case. The court's opinions with respect to each case are set forth in Petitioner's Appendix A3, A17.

that large quantities of marihuana had been observed at the Petitioner's residence in the past. Moreover, the affidavit stated that the confidential informant told the affiants, inter alia, that he was offered marihuana at a reduced price if he would purchase "multiple poundage" at one time. The affidavit stated that the affiants had personally known the confidential informant and that said informant had proven reliable in the past in that he had provided information which had led to the arrest of two persons in the past for possession of controlled substances. Seizure of controlled substances in both past cases provided corroboration of the informant's information.

The affiants stated that in the first controlled buy, (October 10, 1978 in which Detective McBennett participated), the Confidential informant and his vehicle were completely searched to be sure no contraband was present prior to purchasing marihuana from Petitioner's son, Paul, at the Moon residence. The only time at which the informant was out of view was during his presence in the Moon home. He was searched again when he emerged from the home and the marihuana was taken from him. A similar procedure was used during the third (3d) controlled buy (on October 23, 1978 in which Detective McBennett also participated). It is unclear whether the same procedure was used during the second (2d) controlled buy of October 17, 1978 in which Detective Smith participated.

Based upon the affidavit, a warrant was issued and executed at Petitioner's home. The Police discovered and seized numerous contraband items, including: over 4,300 grams of marihuana in six (6) plastic bags found in the crawlspace; three (3) jars of hash oil located in the basement; a growing marihuana plant, several feet tall located in a room and illuminated by two sun lamps suspended from the ceiling; a bag of cocaine; a marihuana "roach" (cigarette butt); an envelope filled with marihuana seeds; and a Cultivator's Handbook of marihuana.

Evidence presented at trial which contributed to Petitioner's misdemeanor conviction for permitting drug abuse included the marihuana roach found in the bedroom of Petitioner's son, Paul (R at 77); the marihuana plant, (R at 96); the vast quantity of marihuana found in the crawlspace, (R at 139-140); and the fact that the Petitioner openly testified at trial that he knew of the plant growing in the room and that he knew said plant was, in fact, marihuana (R. at 264-266).

The Petitioner has cited as error, the trial court's amended charge with respect to the definition of a felony drug abuse offense. The Court charged the jury that "a felony drug abuse offense includes a conviction for possessing hash oil instead of hashish, a Schedule I drug or for possessing marihuana in the quantities alleged (R. at 344-345). The record reflects, and the Ohio Ninth District Court of Appeals notes, that the Petitioner's counsel never specifically objected to this charge (R. at 344-345). See State of Ohio v. Tong Wook Moon, Petitioner's appendix at A8).

SUMMARY OF ARGUMENT

The Respondent contends that the Petitioner has failed to allege a substantial constitutional question in each of his five questions which were presented for review in that the court below applied the proper constitutional law relative to the facts of this case. The petition for certiorari should therefore be denied.

Each of the first two questions presented by the Petitioner are premised upon his allegation that the warrant affidavit was defective; however, the undisputed fact remains that, irrespective of any minor misstatements or insufficient averments, at least one or the other officer/affiants did have personal knowledge of each pre-arranged drug buy. The combination of the informant's personal knowledge and the police work which corroborates that

information satisfies the bifurcated test set forth by this Court in Aguilar v. Texas, 378 U.S. 108 (1964). Moreover, the affidavit is not defective when viewed within the context of Franks v. Delaware, 438 U.S. 154 (1978).

The Petitioner's third argument is also ineffective in that the trial court charged the jury with respect to each and every essential element of the crime; nevertheless, the Petitioner's counsel at trial failed to specifically object to the jury charge and therefore waived said objection in the absence of plain error here, as provided pursuant to Ohio Criminal Rule 30.

Petitioner's fourth argument also lacks merit in that the Court of Appeals never considered theories other than those which were submitted to the jury. The Petitioner's attempt to argue this point belies the true state of facts: the trial court charged that a felony drug abuse offense includes both a conviction (Paul Moon's) for the possession of hash oil and the possession of marihuana. Thus, an offense connotes more than a conviction and, therefore, it was for the jury to consider, based upon the evidence, whether the Petitioner in fact had knowledge of the vast amounts of marihuana and the hash oil which was found on the premises. The Petitioner would have the element of knowledge inextricably linked to the hash oil conviction while completely ignoring other evidence presented.

Finally, Petitioner's fifth argument is devoid of merit in that an appellate level court will reverse upon such grounds only where the record indicates that, as a matter of law, the evidence was insufficient to sustain a verdict of guilty.

ARGUMENT

I. THERE IS NO SUBSTANTIAL FEDERAL QUESTION WHERE EVIDENCE IS ADMITTED AT TRIAL RESULTING FROM THE EXECUTION OF A SEARCH WARRANT BASED UPON AN AFFIDAVIT WHERE EVEN THE UNCONTESTED FACTS CONTAINED THEREIN ARE SUFFICIENT TO SUPPORT A FINDING OF PROBABLE CAUSE; THEREFORE, THERE IS NO VIOLATION OF DUE PROCESS.

Petitioner here attempts to predicate error upon an allegedly defective affidavit, arguing that said affidavit upon which the search warrant was based did not establish the requisite degree probable cause. Such an allegation is clearly erroneous and belies the clear weight of authority relative to this issue.

A search warrant, to be valid, must be issued by a neutral magistrate based upon an affidavit specifying with particularity the place to be searched, the items to be seized and the affidavit must establish the requisite "probable cause" for the issuance of the warrant. Ohio Criminal Rule 41(C). The "...finding of probable cause may be based upon hearsay in whole or in part, provided there is a substantial basis for believing that the source of the hearsay is credible and provided that there is a factual basis for the information furnished. Ohio Criminal Rule 41(C) thus echoes the rule set down by this Court in Aguilar v. Texas, 378 U.S. 108 (1964).

The Petitioner takes issue with only the first prong of the bifurcated test of Aguilar v. Texas, supra, in alleging failure of the affidavit to adequately demonstrate probable cause.

An affidavit will demonstrate the requisite degree of probable cause if sufficient underlying facts specifying the nature of the criminal activity are set forth therein where such facts are based upon the informant's personal observations. State v. Karr, 44 Ohio St. 2d 163, 339 N.E. 2d 641, cert. denied 426 U.S. 936 (1976). The informant's personal observations may be given added weight by corroborative police surveillance and information. State v. Karr, supra; Spinelli v. United States, 393 U.S. 410 (1969); United States v. Harris, 403 U.S. 573 (1971). In addition, independent police work may itself be used to establish the requisite underlying circumstances necessary to support the affidavit. State v. Trent, 74 Ohio Op. 2d 275 (App. 1975).

The affidavit in the present case was based, in part, upon personal observations of a confidential informant. Respondent avers that the affidavit at issue herein clearly satisfied the first prong of the Aguilar test. The search warrant was issued upon an affidavit which stated that the officer/affiants and the informant arranged three (3) controlled "drug buys" from Petitioner's son, Paul Moon, within two weeks prior to the execution of the warrant. (Respondent's Appendix "B"). In one of these buys, one of the officers personally observed Paul Moon greet the informant, who had been thoroughly searched for drugs just moments earlier, at the door of the Moon family home. (Respondent's Appendix "B"). Thereafter, upon departing from the Moon residence, the informant was immediately searched and the officers found the marihuana which the informant stated he had "bought" from the Petitioner's son, Paul Moon. The Supreme Court of Ohio, consistent with this Court's decisions, has held that an affidavit shows sufficient underlying circumstances where the informant's information is based upon his personal observations of criminal activity. State v. Karr, supra. Combining the personal observation of Paul Moon's criminal acts with the corroborating fact that the police officers observed portions of the drug purchases, leads to

the inescapable conclusion that the first prong of the Aguilar test had been met and therefore, that probable cause existed upon which to issue the warrant. The foregoing statement is supported by State v. Karr, supra, wherein the Court stated that an informant's personal observations may be given added weight by corroborative police surveillance and information. Id at 165. See, State v. Grady, 55 Ohio St. 2d 132, 378 N.E. 2d 723 (1978). These controlled buys attested to the reliability of the informant and supported the conclusion that his information had a "substantial basis in fact." United States v. Branch, 565 F. 2d 274, 276 (4th Cir. 1977).

Moreover, the Petitioner does not refute the clear fact that at least one or the other of the officer/affiants did have personal knowledge of each arranged drug buy. (R. 21). This fact, standing alone, is more than sufficient to establish the required probable cause necessary for the issuance of the search warrant. Thus, independent investigation by the officer/affiants which corroborated the information supplied by the informant can be used to further support the required underlying circumstances necessary to a valid affidavit. State v. Trent, 74 Ohio Op. 2d 275 (App. 1975).

In summary, Petitioner's argument fails in that the affidavit in question clearly comports with this Court's decision in Aguilar v. Texas, supra. The affidavit clearly established a substantial basis for the belief that drugs were present in the Moon family home. Therefore, the search warrant was properly issued. See United States v. Harris, 403 U.S. 573 (1971). Thus, no substantial federal question exists in that the decision of the Ninth District Court of Appeals for Lorain County, Ohio clearly comports with this Court's standards as enunciated in Aguilar.

II. WHERE THERE WERE NO MATERIAL MISSTATEMENTS OF FACT IN THE AFFIDAVIT THE SEARCH WARRANT WAS PROPERLY ISSUED.

Petitioner premises his second argument upon the mistaken allegation that material misstatements of fact in the affidavit rendered the search warrant invalid.

Petitioner essentially alleges that the affiants, Detectives McBennett and Smith of the Lorain City Police Department did not have personal knowledge of all facts set forth in the affidavit. One of the two affiants, Detective McBennett, stated at the suppression hearing that he had personally observed the "controlled buys" which occurred on October 10, 1978 and October 23, 1978 (R. 20-21). Testimony revealed that Detective McBennett was not involved in the "buy" of October 17, 1978. (R. 21). However, the other affiant, Detective Smith, did participate in that "buy" of October 17, 1978.

Petitioner further alleges that Detective Smith made a material misstatement by failing to indicate in the affidavit that he was not involved in the other controlled drug purchases. While Detective Smith had not participated in such other "buys", the other affiant, Detective McBennett did supervise these purchases. (R. 21). In summary, then, Detective McBennett participated in two of the three "buys", specifically, those which occurred on October 10th and 23rd, 1978 while Detective Smith actively participated in the October 17th drug purchase. (R. 21). Thus, one or the other of the officers had first-hand personal knowledge of each drug, and each told the other of the drug purchases which occurred on the other dates. Therefore, sufficient probable cause existed.

Two decisions of this Court are dispositive of Petitioner's mistaken allegations that the facts hereinabove set forth constitute material mis-

statements which would effectively render the search warrant invalid. The first case is United States v. Ventresca, 380 U.S. 102 (1965) wherein this Court held that an affidavit is not necessarily insufficient because it fails to disclose which of the facts are hearsay and which are derived through the affiants' own knowledge. In Ventresca, it has been noted that observations of fellow police officers engaged in a common investigation form a reliable basis for a warrant sought by one of their number. United States v. Ventresca, supra. The Supreme Court of Ohio recently echoed this rule in finding that a collation of information gathered from observations of fellow officers "... is plainly a reliable basis for a warrant applied for by one of their number." United States v. Ventresca, supra; State v. Thomas, 61 Ohio St. 2d 223, 400 N.E. 2d 401 (1980). Each above-cited decision, when applied to the facts of the instant case clearly indicate that Petitioner's second argument is without merit in that no substantial federal question exists since the factual basis of this case as applied to Ohio's decisional law is in accord with the fourth amendment requirements as stated by this Court.

Moreover, in Franks v. Delaware, 438 U.S. 154 (1978), this Court stated that:

> "Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires a hearing to be held at the defendant's request. In the event that at the hearing the allegation of perjury or

> reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit." Franks v. Delaware, supra, at 155-156.

Thus, under Franks, then, the Petitioner herein may successfully attack the affidavit only where the excluded portion of the affidavit renders the remainder, as a whole, ineffective in establishing probable cause. Exclusion is mandated only where it is found that perjury or reckless disregard for the truth is present. As the Ninth District Court of Appeals held with respect to this issue also raised in State v. Paul Moon, C.A. No. 2876 at 6 (unreported, 1979) (Petitioner's Appendix A-17), certain statements made here by the affiants were at best the result of negligence or mistake. Clearly, the affiants did not act "knowingly and intentionally, or with reckless disregard for the truth ...", as required to set aside those statements under Franks v. Delaware, supra.

Respondent herein adopts the decision rendered below in State v. Tong Wook Moon, (C.A. No. 3017), unreported, December 24, 1980) wherein the court stated that:

> "We decided then (State v. Paul Moon), as we do now, that even if the affidavit herein was defective under Franks v. Delaware, 438 U.S. 154, 171 (1978), the undisputed fact still exists that at least one or the other of the police officers involved did

have personal knowledge of the arranged "buys" and, hence, sufficient viable information remained to support probable cause."
(See Petitioner's Appendix A-3)

Since the Court of Appeals has correctly applied the Franks decision to the facts in the present case, it is clear that the Petitioner's second argument lacks merit in that the Court of Appeals finding which correctly applied Franks does not operate to create a substantial federal question.

III. (A) NO SUBSTANTIAL FEDERAL QUESTION EXISTS WHERE THE TRIAL COURT INSTRUCTS THE JURY AS TO EACH AND EVERY ELEMENT OF THE CRIME CHARGED AND WHERE SUFFICIENT EVIDENCE IS PRODUCED AT TRIAL WHICH, WHEN CONSIDERED BY THE JURY, WAS MORE THAN ENOUGH TO SPAWN THE JURY'S CONSIDERATION OF POSSESSION OF A LARGE AMOUNT OF MARIHUANA AS A FELONY DRUG ABUSE OFFENSE, REGARDLESS OF THE PRESENCE OF A CONVICTION FOR SUCH AN OFFENSE.

The Petitioner herein was indicted and subsequently convicted for the first degree misdemeanor of Ohio Revised Code Section 2925.13, to wit:

"No person, being the owner, lessee, or occupant, or having custody, control, or supervision of premises, or real estate, including vacant land, shall knowingly permit premises, or real estate, including vacant land, to be used for commission of a felony drug abuse offense by another person." R.C. 2925.13.

Revised Code Section 2925.01(I) defines a felony drug abuse offense as:

> "... any drug abuse offense that would constitute a felony under the laws of this state except a violation of section 2925.11 of the Revised Code."

Further, Revised Code Section 2925.03(G) provides that no person shall knowingly possess a controlled substance in an amount exceeding three (3) times the "bulk amount". The three (3) jars of hash oil, and the quantity of marihuana exceeding 4,300 grams, both of which were admitted into evidence, are such controlled substances for which a conviction for knowingly possessing these substances would be a felony.

In the present case, the trial court in its charge to the jury, stated with respect to the Petitioner's alleged violation of Revised Code Section 2925.13, "Permitting Drug Abuse":

> "Before you can find the Defendant, Tong Wook Moon, guilty of any of these offenses, you must find beyond a reasonable doubt: - - - Count Number 3: that on or about the 23rd day of October, 1978, that Tong Wook Moon, in Lorain County, Ohio, did, knowingly, being the owner, lessee, or occupant, or having custody, control, or supervision of premises, to wit: 4009 Canterbury Court, Lorain, Ohio, permit said premises to be used for the commission of a felony drug abuse offense." (R. at 335-336).

The court continued its charge by defining a felony drug abuse offense as including "... a conviction for possessing hash oil, a Schedule I drug, or for

possession of marihuana in the quantities alleged." (R. at 345). (Note: In the companion case of State v. Paul Moon, which is already fully set forth in Petitioner's Appendix "D", the Petitioner's son, Paul Moon, was convicted for the possession of hash oil, a felony).

The Petitioner, in his argument, alleges at page 21 that the Court's charge was erroneous in that the court prejudicially misdirected the jury and states: "the court ... told the jury this petitioner could be found guilty if, in fact, there had ever been a conviction of anyone (we suppose) of possessing hash oil in that home." Such an allegation is unfounded and belies the fundamental principle behind the instruction.

The trial court here instruced the jury properly and impartially on each element of the offense charged (R. at 335-336, 345). The court did not, in fact or in essence, instruct the jury to find the Petitioner guilty on count three if it found only that Petitioner's son was convicted of possessing hash oil in the home. The court did instruct the jury on the element which required knowingly permitting the controlled premises to be used for the commission of a felony drug abuse offense. (R. at 335-336). Thus, Petitioner's allegation which essentially states that the knowledge element was lacking, is clearly erroneous. The instructions given by the court were clear; moreover, the jury was instructed on each element of the crime and all pertinent terms were defined.

In summary, the Respondent would reiterate the finding of the Court of Appeals in its opinion at page 6 (Petitioner's Appendix at A-8, A-9):

> "If the Court's inclusion in the jury instructions of the conviction for the possession of hash oil was error, it was harmless error since the plethora of circumstantial evidence

> presented to the jury presented a source to spawn the jury's consideration of possession of marihuana as a felony drug abuse offense, regardless of the presence of a conviction for such an offense. State v. Long, 53 Ohio St. 2d 91 (1978)." (emphasis sic).

The record is replete with evidence tending to show that the Petitioner knowingly permitted his home to be used for the commission of a felony drug abuse offense. The Petitioner, on the date in question, owned and controlled the premises known as 4009 Canterbury Court, Lorain, Ohio. Evidence further showed that a large marihuana plant was found growing in the room of Petitioner's son, Phillip, and that the plant was several feet tall (R. at 13-14) and illuminated by two (2) sun lamps suspended from the ceiling. (R. at 46). Moreover, the Petitioner freely and openly testified that he had knowledge of the marihuana plant's presence in the home. (R. at 266). Further, it was shown that the plant was capable of producing 30-50 grams of marihuana and that two thousand ($2,000.00) dollars was found concealed in a heating vent in the family home. (R. at 143-144, 81).

Moreover, evidence adduced at trial showed that three (3) jars of hash oil were found in the basement (R. at 20, 52) and that six (6) bags of marihuana totalling 4,300.4 grams were found in the crawl space of the home. The Petitioner testified that he did spend time in the basement (R. at 269-271).

Therefore, Petitioner's argument in this respect is not within the ambit of Speigner v. Jago, 603 F. 2d 1208 (6th Cir. 1979) and its progeny and, accordingly, no substantial federal question exists. It was a question of fact, for the jury to consider, as to whether the Petitioner possessed the requisite degree of guilty knowledge so as to sustain a conviction of guilty for permitting drug abuse.

(B) NO SUBSTANTIAL FEDERAL QUESTION EXISTS WHERE, IN THE ABSENCE OF PLAIN ERROR AND PURSUANT TO OHIO CRIMINAL RULE 30, THE PETITIONER AT TRIAL FAILED TO SPECIFICALLY OBJECT TO THE COURTS JURY CHARGE BEFORE THE JURY RETIRED AND FURTHER FAILED TO GIVE ANY REASON THEREFOR WHICH THUS BARS THE PETITIONER FROM PREDICATING ERROR ON SAID JURY CHARGE.

Ohio Criminal Rule 30 which comports with its counterpart in the federal rules provides:

> A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection out of the hearing of the jury. (emphasis added)

The foregoing rule has been consistently recognized by the Supreme Court of Ohio, in the absence of plain error. State v. Graven, 54 Ohio St. 2d 114, 116 (1978). The reasoning advanced by the Ohio Supreme Court for such a rule is particularly applicable to the present case:

> "Any other rule ... would relieve counsel from any duty of responsibility to the court and place the entire responsibility upon the trial court to give faultless instructions upon every possible feature of the case, thereby disregarding entirely the true relation of court and counsel which

> enjoins upon counsel the duty to exercise dilligence and to aid the court rather than by silence to mislead the court into commission of error. To permit the gamesmanship would only prolong the final adjudication of the case." (emphasis added)
> State v. Graven, supra, at 116.

Federal decisional law is consistent with Ohio law relative to rule 30. United States v. Franklin, 568 F. 2d 1156 (7th Cir. 1978), cert. denied 98 S. Ct. 1588; United States v. Smith, 584 F. 2d 759 (6th Cir. 1978); United States v. Parisien, 574 F. 2d 974 (8th Cir. 1978).

The Petitioner mistakenly alleges that he specifically objected to a portion of the charge which explained that "a felony drug abuse offense" includes both a conviction for possessing hashish, a Schedule I drug, or for possessing marihuana in the quantities alleged" (over 4,300 grams). The following colloquy transpired after the above charge had been recited:

> Mr. Willis: One other thing, Your Honor, on page 5, while a felony drug offense does include a conviction of Paul Moon, that was for hash oil. If you want to make that change, I don't know. But we have no evidence concerning hashish in this case. There is no evidence relating to that. But we would object to that instruction in any event. Since we have the testimony of an officer that

he believes Paul Moon was convicted of some offense, but we have the offense before the court really.

* * *

Mr. Walker: On the instructions before the Court on page 5, you have included conviction of possession of hash oil. There is no conviction right now for any other offense.

The Court : That is the question I'm not sure about.

Mr. Walker: Because I know, Your Honor, reflecting upon the conviction of Paul Moon is the substance for that particular aspect of the charge. There is no other charge which he has been convicted.

The Court : Counsel has asked for an amendment of the charge which the Court will grant.

Thus, from a perusal of the above-cited record, it is clearly obvious that the trial court granted the Petitioner's proposed amendment and only changed the charge with respect to a conviction for the possession of "hashish" to "hash oil" and then instructed the jury accordingly. The court asked Petitioner's counsel whether there were any further questions, to which counsel responded "Not that we haven't already recovered". (R. at 345). Such a

vague and unspecific objection cannot serve as the basis of an appeal on this issue. The rule has been designed to discourage such a trial tactic. State v. Graven, supra, at 116.

The Court of Appeals below specifically noted that:

> "A perusal of the record reveales that defendant (Tong Wook Moon) did not specifically object in the trial court regarding the error he claims on appeal. Nor do we find that but for said alleged error, the outcome of the trial clearly would have been otherwise." (See Petitioner's Appendix at A-9).

Moreover, the court noted that such an alleged error cannot, consistent with the Ohio Supreme Court's holding in State v. Long, 53 Ohio St. 2d 91, 97 (1978), be viewed as plain error. The Court of Appeals reasonably rejected such a claim of error. Accordingly, Respondent herein contends that no substantial federal question exists.

IV. NO SUBSTANTIAL FEDERAL QUESTION EXISTS IN THAT THE NINTH DISTRICT COURT OF APPEALS PROPERLY REVIWED PETITIONER'S CONVICTION FOR PERMITTING DRUG ABUSE ON THE THEORY WHICH WAS SUBMITTED TO THE JURY WHERE SAID COURT MERELY EXAMINED THE RECORD IN ITS ENTIRETY AND CONCLUDED THAT THE ELEMENT REQUIRING A "FELONY DRUG ABUSE OFFENSE" WAS PROPERLY DEFINED IN THE TRIAL COURT'S CHARGE.

There does exist, as the Petitioner contends,

the tenet that an appellate level court must adhere to the theory submitted to the jury by the prosecution in its review of the proceedings below. Pearson v. United States, 192 F. 2d 681, 693 (6th Cir. 1951). The Ninth District Court of Appeals has committed no error relative to this issue.

The Petitioner was indicted for the violation of Ohio Revised Code Section 2925.13, for knowingly permitting the premises controlled by him to be used for the commission of a felony drug abuse offense. Ohio Revised Code Section 2925.01(I) defines a felony drug abuse offense as:

> "... A drug abuse offense that would constitute a felony under the laws of this state ..."

Moreover, Ohio Revised Code Section 2925.03(A)(6) provides that no person shall knowingly "possess a controlled substance in an amount equal to or exceeding three times the bulk amount". The three (3) jars of hash oil and the marihuana totalling over 4,300 grams are both such controlled substances.

In the instant case, the trialcourt charged the jury with respect to Petitioner's alleged violation of Revised Code 2925.13, that:

> "Before you can find the Defendant guilty of any of these offenses, you must find beyond a reasonable doubt ... that on or about the 23rd day of October, 1978, that Tong Wook Moon, in Lorain County, Ohio, did, knowingly, being the owner, lessee, or occupant, or having custody, control, or supervision of premises, to wit: 4009 Canturbury Court, Lorain, Ohio, permit said premises to be used for the commission of a felony drug abuse offense. (R. at 335-336).

The court continued its charge by defining a felony drug abuse offense as including "... a conviction for possessing hash oil, a Schedule I drug or for possession of marihuana in the quantities alleged." (R. at 345). (Note: In the companion case, State of Ohio v. Paul Moon, Paul Moon, Petitioner's son, was convicted of possessing hash oil found in the basement of Petitioner's home).

Petitioner has alleged that since he was acquitted on a possession of marihuana charge contained in the indictment, the only possible basis to the charge of "Permitting Drug Abuse" must have been related to his son's felony conviction for possessing hash oil. Such an allegation is clearly erroneous. The appellate court properly considered the case upon the theory presented to the jury, said theory being that the Petitioner controlled the premises and knowingly permitted the commission of a felony drug abuse offense thereon. Examples of such a felony drug abuse offense recognized by the Court of Appeals as they read the record and briefs were: (1) the felony conviction of Petitioner's son, Paul Moon, for the possession of hash oil, and (2) the presence of over 4, 300 grams of marihuana in the Moon home which would constitute a felony drug abuse offense. (State v. Tong Wook Moon, Petitioner's Appendix at A-8, A-9)

The Petitioner's argument at page 26 which essentially alleges that since the Petitioner was acquitted of marihuana possession charges, the only remaining basis for his conviction was Paul Moon's felony conviction for possession of hash oil, is clearly and completely erroneous.

Such a specious allegation belies the true meaning of the element of "felony drug abuse offense" as contained within the statute under which the Petitioner has been charged. Ohio Revised Code Section 2925.01(I) defines "felony drug abuse offense" relative to this issue as any drug abuse offense which would constitute a felony under the

laws of this state. Thus, a violation of Ohio Revised Code Section 2925.13, "Permitting Drug Abuse" includes both the conviction for the possession of hash oil and the possession of marihuana by another so long as Petitioner had the requisite guilty knowledge thereof.

As the Court of Appeals succinctly noted:

> "If the court's inclusion in the jury instruction of the conviction for possession of hash oil was in error, it was harmless error since the plethora of circumstantial evidence presented to the jury presented a source to spawn the jury's consideration of possession of marijuana as a felony drug abuse offense, regardless of the presence of a conviction for such an offense." (State v. Tong Wook Moon, Petitioner's Appendix at A-8, A-9)

Large amounts of marihuana, over 4,300 grams, were found in the Moon family home, in addition to the three (3) jars of hash oil for which the Petitioner's son, Paul, had been convicted. A large marihuana plant was found in a Petitioner's son's bedroom (R. at 13-14) and was illuminated by two (2) sun lamps suspended from the ceiling. (R. at 46). Moreover, the Petitioner openly testified that he had knowledge of the marihuana plant's presence in his juvenile son's room (R. at 266).

Thus, for the Petitioner to state that because he was acquitted of marihuana possession charges, no other felony drug abuse offense could possibly have been committed with his knowledge (other than his son's felony conviction for hash oil possession) clearly defies reason. Knowingly possessing a controlled substance is rather different than knowingly permitting another to

possess a controlled substance in one's home.

The theory upon which the appellate court considered this case was wholly consistent with that which was submitted to the trial court. Accordingly, there is no substantial federal question and therefore, Petitioner's argument in this respect is devoid of merit.

V. NO SUBSTANTIAL FEDERAL QUESTION EXISTS WHERE THE APPELLATE COURT FINDS THAT THERE WAS SUBSTANTIAL EVIDENCE PRESENTED WHICH, IF BELIEVED, WOULD CONVINCE THE JURY OF THE PETITIONER'S GUILT BEYOND A REASONABLE DOUBT.

The Petitioner does not contest the fact that on the date the warrant was executed, he owned or otherwise controlled the premises known as 4009 Canterbury Court, Lorain, Ohio. The Petitioner has premised his argument here on whether sufficient evidence was presented at trial which would enable a jury to reasonably infer that Petitioner had the requisite knowledge that a "felony drug abuse offense" was occurring at his premises. The appellate court was well within the parameters of the applicable constitutional prerequisites in holding that there was sufficient evidence, as a matter of law, to sustain the Petitioner's conviction.

The Fourth and Fourteenth Amendments to the Constitution of the United States guarantee that no person shall be convicted of a crime unless the trier of fact is convinced beyond a reasonable doubt of every element of the offense. In Re Winship, 397 U.S. 358 (1970). An appellate court may sustain a conviction on review where, in construing the evidence in the prosecution's favor, said court concludes that a rational trier of fact could have found that each essential elements of the crime was proven beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. 307 (1979); State v. Eley, 56 Ohio St. 2d 169 (1978); State v. Sorgee, 54 Ohio St. 2d 464 (1978).

The Court of Appeals concluded that the record revealed circumstantial evidence sufficiently substantial so as to enable the jury to exclude a reasonable hypothesis of innocence. (Petitioner's Appendix, A-15). A perusal of the record indicates that the Petitioner had knowledge of a large marihuana plant growing in his son's bedroom which was illuminated by two (2) sunlamps (R. at 13-14, 46). The plant was capable of producing 30-50 grams of marihuana. (R. at 143-144). Moreover, two thousand ($2,000.00) dollars was found concealed in a heating vent (R. at 81). The Petitioner admitted knowledge of the plant at least three days prior to the search, although he alleged that he thought it was his son's "school project". (R. at 266). The jury could reasonably conclude, therefore, that the Petitioner did have knowledge that his juvenile son, Phillip, was cultivating marihuana, a violation of Ohio Revised Code Section 2925.03(A)(3), a Felony of the second degree. (But for Phillip's minority).

Three (3) jars of hash oil were found in the basement (R. at 20, 52). The quantity contained therein exceeded three times the "bulk amount" (R. at 139). Petitioner's son, Paul, was convicted of possessing this hash oil. Said conviction was a felony. A large box was also found in the basement crawl space and contained over 4,300 grams of marihuana. (at 25.35 grams to the ounce, the total marihuana found was well in excess of nine (9) pounds). (R. at 139-140). This amount greatly exceeds the "bulk amount" for marihuana under Ohio law which is 600 grams or 21 ounces. The hash oil was found in the basement together with the vast quantity of marihuana found in the basement crawl space. The Petitioner testified that he did go down into the basement to use the bar and to store books (R. at 269, 271). The jury could reasonably conclude that the Petitioner did have knowledge of

the marihuana and that he did permit a member of his household to possess it. Possession of over three (3) times the bulk amount of either hash oil or marihuana is a violation of Ohio Revised Code Section 2925.03(A)(6), "Aggravated Trafficking in Drugs", a second degree felony.

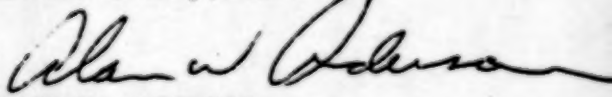
In summary, the record reveals that the evidence presented at trial was more than sufficient, as a matter of law, to support a verdict of guilty. Accordingly, Petitioner's argument in this respect is clearly without merit.

CONCLUSION

The Respondent contends that no substantial federal question exists relative to each of the questions presented by the Petitioner. Accordingly, and for the reasons hereinabove set forth, the Respondent respectfully requests that the Petition for a writ of certiorari be denied.

Respectfully submitted,

GREGORY A. WHITE
Prosecuting Attorney
Lorain County, Ohio

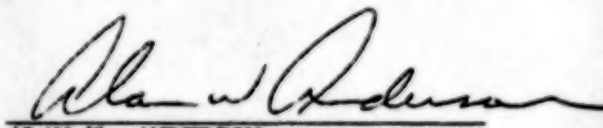
By: 

ALAN W. ANDERSON
Assistant Prosecuting Attorney

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Respondent's Brief in Opposition together with attached appendices has been served upon James R. Willis, Esq., Attorney for Petitioner, Bond Court Building, Suite 1600, 1300 East Ninth Street, Cleveland, Ohio, 44114, by mailing three copies of same via regular U.S. mail this 9th day of October, 1981.



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NO. 81-238

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

TONG WOOK MOON,

PETITIONER,

v.

STATE OF OHIO,

RESPONDENT.

RESPONDENT'S APPENDIX

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APPENDIX "A"

RULE 30

INSTRUCTIONS

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. Copies of such requests shall be furnished to all other parties at the time of making such requests. The court shall inform counsel of its proposed action upon the request prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. The court need not reduce its instructions to writing.

A party may not assign as error the giving or the failure to give any instructions unless he objects thereto before the jury retires to consider its verdict, stating specifically the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

APPENDIX "B"

AFFIDAVIT FOR SEARCH WARRANT

Before me, Judge Floyd D. Harris, Judge of the Common Pleas Court, personally came Detectives James McBennett and Jay Smith, of the Lorain Police Department Narcotic Bureau, who being first duly sworn according to law depose and say that they have good cause to believe that on the premises known at 4009 Canterbury Court, Lorain, Ohio, there is now being unlawfully kept, concealed, and possessed (for the purpose of sale) the following described contraband:

(1) Marijuana (Cannabis sativa L), a Schedule I Drug under the Controlled Substance Section of the Ohio Revised Code (ORC 3719).

Said address, known as 4009 Canterbury Court, City of Lorain, County of Lorain, State of Ohio, is currently occupied and controlled by Tong W. Moon, his wife Kyung Moon, and their sons, PHILLIP MOON AND PAUL J. MOON. Said address being further described as a one story, tan brick, single

family dwelling, with an attached garage on the west end. The residence is located on the southwest corner lot of Sherwood Drive and Canterbury Court in the City of Lorain. County of Lorain, State of Ohio. The structure is tan brick with white trim. The front entrance consists of double doors, brown in color, with orange trim. There is a circular concrete driveway in front of the residence. Also, there is a brown wooden fence surrounding the rear yard in the southside of the residence. The fence abuts the house on the southeast and southwest corners.

The facts upon which the affiants base such belief are as follows:

Affiants state that they are members of the Lorain Police Department Narcotic Bureau, and that it is part of their normal duties to investigate all matters involving illegal drug activity in the City of Lorain. Affiants state that PAUL MOON has been under investigation at various times since 1977. In December, 1977, PAUL MOON was mentioned in a Lorain Police Department Report as attempting to

cash in nine thousand-four hundred dollars ($9,400.00) in tens and twenties at the City Bank Company located in the Clarkins Department Store on Leavitt Road in the City of Lorain. PAUL MOON, with another party, cashed in the tens and twenties for one hundred dollar bills. At the time of this incident, PAUL MOON was eighteen years old.

In late September 1978, affiants received information that PAUL MOON had recently been involved in the transportation of five hundred pounds of Marijuana from Fort Lauderdale, Florida, to Lorain, Ohio, for the purpose of sale.

Affiants have identified the vehicle used. Owner of said vehicle was not directly involved in the transportation of the drugs from Florida to Lorain. Affiants further state that they have received information from a very reliable informant, personally known to the affiants, who has provided information on at least two occasions which have led to the arrest of persons having possession of Controlled Substances. In both cases, seizures of Controlled Substances were made, corroborating the

information provided by our Confidential Informant, (hereafter referred to as CI).

In late September 1978, the affiants were approached by the CI, who related that large quantities of Marijuana, a Schedule I drug, had personally been observed by the CI at the PAUL MOON residence, 4009 Canterbury Court, Lorain, Ohio, in the past. The CI also related to the affiants that PAUL MOON had recently been involved in the transportation of five hundred pounds of Marijuana to Lorain from Florida. The information had previously been received from a different informant. Affiants further state that CI was offered marijuana at a reduced price if the CI would purchase multiple poundage at one time. Drug deals are openly discussed on the telephone, and in person, at the residence.

During the second week of October 1978, affiants were again approached by the CI, who stated that PAUL MOON keeps Marijuana at his residence, 4009 Canterbury, Court, Lorain, Ohio, for the purpose of sale. The CI related to the affiants

that marijuana could be purchased from PAUL MOON. A "controlled buy" was arranged. The CI was then furnished with money to make this "buy". The CI was completely searched, along with the CI's vehicle, to make sure no contraband items were present. The CI was then followed to the PAUL MOON residence. 4009 Canterbury Court, Lorain, Ohio, where the CI entered and stayed for a short time. The CI then handed the affiants the suspected Marijuana. The CI stated that it was purchased directly from PAUL MOON, in his residence, 4009 Canterbury Court, Lorain, Ohio. During the CI's presence at the MOON residence, PAUL MOON was, also, observed at the residence by a member of the Lorain Police Department Narcotic Bureau. The only time that the CI was out of view was during the time in the MOON residence. The suspected Marijuana was later taken to the Lorain County Community College Criminalistics Lab and analyzed as Marijuana, a Schedule I Drug. Affiants state further that to divulge the exact date of the "controlled buy" would jeopardize the CI's safety.

The CI was provided with Lorain Police funds and a second buy of Marijuana was obtained from PAUL MOON at the 4009 Canterbury Court residence.

A third buy was planned by the CI from PAUL MOON. The CI was again completely searched and followed to the residence. The deal was made with PAUL MOON at the residence and Marijuana was obtained from PAUL MOON in exchange for money which had been given to the CI from the Lorain Police Department funds. The suspected Marijuana was taken to Lorain County Community College Lab and identified as Marijuana by the Criminalist.

Affiants say that pursuant to the information received and the corroboration thereof (through informant contacts, personal observations, and one "controlled buy" made from the MOON residence), affiants believe that an unknown amount of Schedule I Drug, to wit: Marijuana, instruments to package it for distribution, and records of said drug transactions, are being kept, furnished sold, and concealed in the described structure at 4009 Canterbury Court, Lorain, Ohio.

Affiants are requesting a Search Warrant for the described 4009 Canterbury Court residence, all safes, vaults, and locked compartments therein, all located within the City of Lorain, County of Lorain, State of Ohio. Affiants further ask that the Search Warrant include PAUL MOON and others located in the described residence, in order to conduct a search for Marijuana, instruments for packaging for distribution, and records of said transactions. Affiants are requesting the search include two vehicles which PAUL MOON is known to operate, to wit:

(1) A 1977 Pontiac Grand Prix, white in color, bearing Ohio License Number BU-4356.

(2) A medium blue sports car, with gray wheels, bearing Ohio License Number U-44879.

Affiants further state that there is urgent necessity that said Search Warrant be executed in the daytime in order to allow affiants to execute it at a time when we can prevent the concealing and disposal of said Marijuana. Said affiants believe, and have good cause to believe, that said Marijuana,

and instruments used for the packaging for distribution of said Marijuana, or some part thereof, are unlawfully concealed at said 4009 Canterbury Court, City of Lorain, County of Lorain, State of Ohio.

/s/ James McBennett
Det. James McBennett
Lorain Police Department
Lorain, Ohio

/s/ Jay Smith
Det. Jay Smith
Lorain Police Department
Lorain, Ohio

Sworn to before me and signed in my presence, this 24th day of October, 1978.

/s/ Floyd D. Harris
Common Pleas Court